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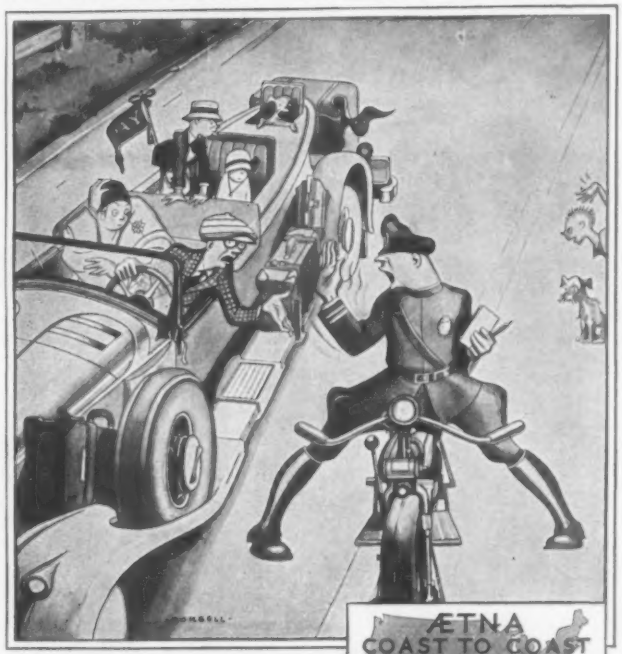

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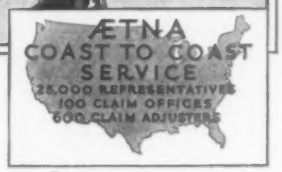

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AMERICAN BAR ASSOCIATION
JOVRNAL

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Rhode Island Judicial Council Makes Fourth Report

A NOTABLE legislative willingness to adopt the recommendations of the Rhode Island Judicial Council and favorable results to date from such adoption are shown in the fourth Report of the Council, submitted to the Governor in December. The Report also contains a statement of matters now under consideration by that body.

The first report made these recommendations: Additional Justices of the Superior Court; that the civil jurisdiction of District Courts be raised to $1,000; that the claim of jury trial on return day in District Courts can be abolished; that the method of removing cases from the District Court to the Superior Court, after decision in the District Court, be by appeal rather than by claim for jury trial; that reasonable substantial costs be imposed upon appeal from District Courts; that jury trial if desired be claimed in the Superior Court; that the present law (Sec. 4908 Gen. Laws 1923) providing for the filing of further pleas in the Superior Court in cases brought up from District Courts be amended so as to include demurrers.

An additional Justice was given the Superior Court in 1930, we are told, and the other recommendations of this first report were all adopted and became effective on Sept. 16, 1929. A year has passed since then and the results of the new procedure are evident. The prediction that the effect of the recommendations increasing the civil jurisdiction of the District Court and minimizing appeals to the Superior Court would be to cut down the number of Superior Court docket cases for jury trial, has been vindicated. The figures for the later court show that the number of actions-at-law, which include appeals from District Courts, have been reduced forty percent in the past year. The effect of requiring a jury trial to be claimed, when that form of trial is desired in civil cases, is shown by the fact that fifty-seven actions-at-law were tried without a jury, whereas in previous years the number so tried had been so small as to be entirely negligible. The statute embodying this provision was challenged but its constitutionality was upheld in the case of Mandeville, Brooks and Chaffee vs. Fritz, 50 R. I. 513.

"There were three principal recommendations in the second Report," we are told, "namely, (1) doing away with the rule requiring the dismissal of a bill in equity where fraud is alleged but not proved, (2) separation of debt collecting from controversial litigation by provision for the entry of summary judgments in cases involving no substantial question of fact, (3) waiver of jury trial in criminal cases. The adoption of these recommendations, which went into effect in 1929, obviously tended to expedite both civil and criminal litigation, and the use that has been made of the summary judgment procedure in both the superior and district courts proves its effectiveness. The act was amended this year to include actions for the collection of a tax, etc. . . There were ninety judgments entered under the provisions of this procedure in the space of a little over a year after the act became effective. The use of this procedure and the increased number of trials without jury are reflected in the falling off of the number of jury trials. This year there were 370 jury trials, last year there were 428, a difference of 58 trials."

When it comes to trial of criminal cases without jury, however, the Report is not able to chronicle notable progress. "Trial of criminal cases without a jury reduces the time and cost of such trials, and its increased use elsewhere should promote its

adoption here. Unfortunately, thus far but few cases have been so tried in this state." "Last year," the Report adds, "the Council recommended an act to give the Courts rule-making power. This act became Chapter 1613 of the Public Laws, and the Supreme Court has appointed a committee of three of its members (Justices Charles A. Walsh, Antonio A. Capotosto and Alexander L. Churchill) to consider such changes in the rules of practice as they saw advisable."

Under the head of "Subjects Now Under Consideration" the Report deals with "References of Cases to an Auditor," "Omission of Provisions for Children in a Will," "Examination of Adverse Party Prior to a Trial" and "Incorporation of the Bar." On the last subject the Report says that "the plan has been given considerable attention by the Council and the arguments both for and against it have been set forth and discussed at meetings, and, while the Council does not believe that any specific recommendation can be made upon it at this time, the continued growth of the plan may warrant a recommendation later." On the subject of "Omission of Provision for Children in a Will" the Report makes the following observations which will no doubt be of general interest:

"General Laws 1923, Chapter 298, Section 22 and 23 provides:

"'SEC. 22. When a testator omits to provide in his will for any of his children or for the issue of a deceased child, they shall take the same share of his estate that they would have been entitled to if he had died intestate, unless it appears that the omission was intentional and not occasioned by accident or mistake.'

"'SEC. 23. When a child of a testator, born after his father's death, has no provision made for him by his father in his will or otherwise, he shall take the same share of his father's estate that he would have been entitled to if his father had died intestate.'

"The objection has been made to the first section that it gives rise to a great amount of needless litigation, i. e., it is necessary to prove in each case that the omission was intentional, although cases of unintentional omission are rare. That instances of intentional omission, with failure to express the intention in the will, are common, and that instances of unintentional omission are rare, is shown by the large number of cases brought to establish the intention, and the large percentage of these in which the intention to omit is successfully shown. The courts recognize the probability that the omission is nearly always intentional, by allowing the intention to be shown by parol evidence. (In re O'Connor, 21 R. I. 465; Jenks vs. Jenks, 27 R. L. 40; Hurley vs. O'Sullivan, 137 Mass. 86.)

"While the above statutes, in a strict sense, may be deemed to deal with substantive rather than adjective law, the direct effect they have had toward increasing the bulk of what may be considered needless litigation renders the matter more or less a procedural one, and brings it perhaps within the purview of the Judicial Council.

"There are three classes of children falling within the provisions of the sections quoted, those born before the execution of a will, those born after its execution (R. I. Hospital Trust Co. vs. Hail, 47 R. I. 64), and those born after the death of the testator.

"Of the three classes, the first vastly outnumbers the others, for wills are seldom made except late in life, while the greater number of children are born early in the married life of the parents. In the cases brought under the statute, therefore, the children are very largely of the first class or those born before the execution of the will and, since it is rare that a testator unintentionally omits provision for these, this class of cases represents both the bulk and the needless part of the litigation. The law should not be expected to provide for every possible contingency or to cure every rare and isolated case of injustice. If the statute (section 22) was amended so as to provide for children of the second class only, the needless litigation would be done away with. In such form the statute would read

"'When a testator omits to provide in his will for any of his children born after the execution of his will (or for the issue of such a child if the child predecease the testator), they shall take the same share of his estate that they would have been entitled to if he had died intestate, unless it appears that the omission was intentional and not occasioned by accident or mistake.'

"The statute in this form would be similar to that of the earlier statute in Rhode Island, which was as follows:

"'Whenever any child shall be born after the execution of his father's or mother's will, without having any provision made for him in such will, he shall have a right and interest in the estate of his father or mother, in like manner as if the father or mother had died intestate, and the same shall be assigned to him accordingly.' (Public Statutes 1882, Ch. 182, Sec. 12.)

"It is open to the objection that it may create a preference of one child over another. A will might make some provision for a child born before its execution and a child born after its execution might receive, under this statute, or under section 23, a greater share of the estate than was given the first child.

"To overcome this, the suggestion has been made that the statute might provide that in the event of a child being born after the making of the will, or after the death of the testator, with no provision for this contingency, any provision in the will for children born before its execution shall be revoked, and all the children shall takes the shares they would have taken had the testator died intestate.

"The matter has been dealt with in other states somewhat differently. In Connecticut the provision reads:

"'If, after the making of a will, the testator shall marry or a child shall be born to the testator or a minor child shall be legally adopted by him, and no provision is made in such will for such contingency, such marriage, birth or adoption of a minor child shall operate as a revocation of such will.' (Conn. Pub. Acts 1927, Chapter 227.)

"Such a statute does not require a positive and beneficial provision for an after-born child but secures it against being passed by through inadvertence. (Blake vs. Union & New Haven Trust Co., 95 Conn. 194.)

"In Alabama the provision and construction placed upon it by the Court is as follows:

"'Section 1599 of the Code of 1852, which has survived without change to the present time (sections 6160, Code of 1907), is as follows: "Wherever a testator has a child, born after the making of his will, either in the lifetime or after the death of the testator, and no provision is made in the will in any way for such a contingency, such birth operates as a revocation of the will, so far as to allow such child to take the same share of the estate of the testator as if he had died intestate." For analogical reference hereafter, we here set out also section 1597 of the Code of 1852, which almost immediately precedes section 1599: "If after making of any will, disposing of his whole estate, the testator marry, and have issue of such marriage, born either in his lifetime, or after his

death, and the wife or such issue is living at the death of the testator, such will must be deemed revoked, unless provision has been made for such issue, by some gift or settlement; or unless such issue has been provided for in the will, or in such way mentioned therein, as to show an intention not to make such provision; and no other evidence can be received for the purpose of rebutting the presumption of such revocation." This section survived without change until it was repealed by elimination from the Code of 1907.

"'Section 1597 of the Code of 1852 (as section 1953 of the Code of 1886) was the subject of consideration by this court in the case of Gay v. Gay, 84 Ala. 38, 4 South. 42. It was there said: "A construction should not be placed on the statute which will impair or interfere with the right of the testator to absolutely dispose of his property as he may deem proper, further than its terms, expressly or by clear implication, require to accomplish the intended ends. It does not operate to deprive the testator of the right and power to determine the nature and extent of the provision which he will make for those having claims on his natural affections. It does not undertake to declare the measure and extent of the provision which the testator must make for the after-born child. He may make no provision whatever, provided the child is mentioned in the will in such a way as to show an intention not to make any provision. The requirements of the statute are satisfied if it is shown by a provision, made by gift or settlement, or by mention of the issue in the will, that such issue was fully in his mind and contemplation, and that he acted deliberately on the matter of making provision for such issue.'

"'We approve this reasoning, and think it is equally applicable to the statute here involved. The two statutes were framed and adopted at the same time, and are intimately related. It is impossible to conceive of a legislative policy so at variance with itself and with reason as to dispense with any positive provision for after-born children—where the testator so expressly wills—in the one case, and to require it in the other. The language of the statute clearly forbids such a theory. It is to be observed that provision is to be made, not for after-born children, as most statutes require, but only for the contingency—that is, the chance event—of their birth, and not any definite provision, but provision "in any way." This can only mean that the testator must have borne that possible future event in his mind, and in the light of that consciousness, subject to its tempering influence, must have deliberately and expressly disposed of his property to the exclusion of such possible future children; and when this consciousness, this purpose, and this disposition, are clearly expressed in the will, the partial revocation provided for by the statute is avoided.' (Shackelford vs. Washburn, 180 Ala. 168, 170-173.)

"Both the Connecticut and Alabama cases stress the point of interfering with and restricting the testator's testamentary rights as little as possible. The question is one of considerable interest to members of the bar, and is of considerable importance generally in view of its effect upon titles to property."

Under the head of "Examination of Adverse Party Prior to Trial" the Report points out that the present statute provides for the production and examination of documents in the possession or control of an adverse party, but makes no provision for the discovery of facts, although the facts are necessary to the proof of the other party's case. It deals with the situation in other states, with particular reference to Massachusetts, and reaches the conclusion: "That some procedure should be made available in this state for the examination of an adverse party prior to trial is evident, since that by way of taking his deposition is not open (Tilden-Thurber Corp. vs. Farnell *supra*), but whether the matter is one that should be handled by statute, or by rule of court, or partly by one and partly by the other, as well as the exact procedure to be adopted is a question upon which the Council is not yet agreed."

The Report is signed by Elmer J. Rathbun, Chairman; Charles A. Walsh, Max Levy, George H. Huddy, Jr., Francis B. Keeney and Edward C. Stiness.

Cleveland Bar Opposes Public Defender Plan

THE Executive Committee of the Cleveland Bar Association has gone on record against the Public Defender plan of representing indigent defendants in criminal cases. In taking this action, the Committee adopted the report of a special committee on the subject, made up of Sidney H. Moss, Benton W. Davis, Irving J. Cassidy, Clarence H. Marcuson, A. F. Gallagher and James C. O'Connell. A. R. Johnson, another member of the committee, submitted a minority report recommending the Public Defender Plan.

The commitee advanced these arguments in favor of its report: (1) Due to the great volume of business, the Public Defender would become hardened to such a degree that unless a defendant's story was clearly one which would acquit him, the Public Defender might become indifferent to the justice of each case. (2) The Public Defender would not show the same degree of enthusiasm which is shown where a young lawyer or older lawyer is assigned to defend a particular case. (3) The Public Defender is too prone oftimes to discount the story given him by a defendant. (4) Resulting from indifference, discounting of stories and lack of enthusiasm, comes the suggestion on the part of the Public Defender to indigent prisoners that they change their plea from "not guilty" to "guilty." (The records of some public defenders' offices are appalling in this respect. New London County, Connecticut, records show that nine out of ten indigent prisoners plead guilty, and that in twelve years there have been but four acquittals.) (5) The advent of the Public Defender means a new political job. Whether this is good or bad is debatable, but the general opinion seems to be that the new job means new patronage, favors and corruption. (6) Creation of the office of Public Defender would result in a majority of cases being prosecuted and defended by the same set of men because of the fact that the Prosecutor and the Public Defender would in many cases act together.

The arguments in favor of the Public Defender, as cited by the committee, were: (1) That the office would be more economical to the county than the present system of paying individual fees. (2) An able Public Defender would in more instances give an adequate defense to an indigent prisoner than does the general run of assigned counsel. (3) The defendant would be assured of good preparation as to the law as well as to the facts. (4) A distinct saving of time to the county would result. (5) There would be a tendency on the part of the Public Defender to sift the deserving cases from the undeserving. (6) The diligent Public Defender would aid the indigent prisoner in obtaining a minimum sentence by entering a proper plea of guilty when the same should be entered. (7) Fewer unscrupulous and perjured offenses would be committed in court. (8) The general standing or the tone of the criminal courts, and of attorneys, is raised in communities wherever the Public Defender system has worked successfully.

The committee argued that the assigned counsel at the present time are adequately defending prisoners. It recommended continuation of the present system: an increase in the amount of fees paid to counsel assigned to the so-called "lesser

offense" cases; and the appointment of a court reporter to attend each criminal case and to take stenographic notes of the testimony therein and to reduce the same to a bill of exceptions to be furnished as a matter of right to every defendant who may wish to appeal his conviction.

Plan to Preserve Chief Justice White's Birth Place as Memorial

PUBLICATION of a notice in the January issue of the JOURNAL about the plan to preserve the home of the late Chief Justice Taney as a national shrine has brought a communication from Mr. Francis L. Knobloch, of Thibodaux, La., in which he calls attention to a similar plan with reference to the birthplace of the late Chief Justic White. A corporation was formed at Thibodaux some years ago, known as the "Chief Justice White Memorial Association, Inc.," empowered to acquire and restore the place. Mr. Knobloch is President of the association, and the list of directors is composed of well known judges, practicing lawyers and leading representatives in other professions and in the business world.

In pursuance of the authority conferred, the association acquired the old home and five acres of land. It fronts on Bayou La Fourche, and is on a highway, we are told, where the first rural free mail delivery in the United States was undertaken. It was built by the late Governor White of Louisiana, father of the Chief Justice, and he lived in it while Governor and until his death. Chief Justice White owned the plantation until 1920. Purchase of the home and grounds adjoining was made in 1927 from the purchasers from the late Chief Justice.

The house is a frame structure and the roof is of hand split shingles. The exterior has been restored, and when the interior is completed it will be furnished with objects calculated to record the life story of the great man whose memory the restored building will help to preserve. Twelve thousand dollars have already been contributed to the project.

Law Administration in Federal Courts to Be Studied

PRESIDENT HOOVER'S National Commission on Law Observance and Enforcement has approved plans for a national study of law administration in the Federal courts of the United States. The study will be made through twelve university law schools of the country, each conducting a unit of research in its own locality, we are told in the public announcement of the project. The work will be supervised by a Committee on Federal Courts appointed by the Commission, which consists of Dean Charles E. Clark, Yale Law School, Chairman; Dean Thurman W. Arnold, University of West Virginia Law School; Dean Henry M. Bates, University of Michigan Law School; President Robert M. Hutchins, University of Chicago; Professor Harold R. Medina, Columbia University Law School; Professor Edmund M. Morgan, Harvard University Law School; Professor Orrin K. McMurray, University of California Law School; and the Hon. Owen J. Roberts, of Washington, D. C., Associate Justice of the Supreme Court. Professor William O. Douglas of the Yale University Law School is acting as Secretary to the Committee.

"The project, which has been authorized to begin as of October 1, 1930, and to end June 30, 1931, is aimed," the statement continues, "at a study of law administration in the Federal courts through a scientific analysis of case records, both civil and criminal, in those courts. The general purpose of the study is to test the efficacy of the administration of justice in the Federal courts. Concrete factual, statistical information is being sought to illustrate and test the efficacy of rules, procedure, and general methods of administering justice. This involves the collection of actual figures bearing on congestion and the types of business entering and being disposed of in the Federal courts, the time spent by the courts on the various types of litigation, the disposition of criminal cases on 'bargain days,' and aspects of the so-called 'break downs' in the system. All civil and criminal cases terminated in the Federal district courts during the five year period ending June 30, 1930, are being investigated. Information is obtained from the files and dockets of the clerks of the courts, and of the district attorneys, and from the transcripts of the commissioners.

"The work in the various districts is being done through the law schools and is being supervised by the representatives of these schools in the Federal district courts in the following states: Connecticut, under the supervision of Dean Clark and Professor Douglas; Massachusetts, Professor Morgan; New York, Professor Medina; Michigan, Professor Bates; Ohio, Dean H. W. Arant and Professor Silas A. Harris, of Ohio State University Law School; California, Dean McMurray; Kansas, Professor Thomas E. Atkinson, of the Kansas University Law School; Colorado, Dean James G. Rogers, of the University of Colorado Law School; West Virginia, Dean Arnold; Louisiana, Dean Rufus C. Harris, of the Law School of Tulane University; North Carolina, Dean Charles T. McCormick, of the University of North Carolina Law School; and Illinois, Dean Harry A. Bigelow, and Professor E. W. Puttkammer, of the University of Chicago Law School.

"Field workers in the various states, who are being supervised by the representatives of the law schools engaged in the study, are as follows: Colorado, Ward B. Showalter; Illinois, Robert N. Reid and Leon Gross; Louisiana, Robert Weinstein; West Virginia, Harold J. Saum and James E. Hague; Kansas, Miss Elizabeth Arnold; North Carolina, Neil S. Sowers and Henry Bane; California, Harold Boucher, Otto Rohwer, Irene McGovern, and Walter C. Frame; Ohio, Miss Grace Heck, Henry C. White, and Roland W. Dings; Massachusetts, I. H. Gorovitz and W. J. O'Neill; Michigan, J. Edward Finley and Dudley W. Apps; Connecticut, Irving Sweedler; and New York, Frank V. Goggins, Theodore R. Lee, Lester Milich, and Peter Rosenberg. Charles U. Samenow is employed in New Haven in the statistical work in connection with the study.

"Chairman Wickersham, in commenting upon the project, said: 'Two things concerning the study of the business of the Federal courts now being carried on for the National Commission on Law

Observance and Enforcement may be especially noted. The first is that this is a scientific study of law administration designed to show accurately the day-by-day activities of the courts of the particular districts studied. For these districts, therefore, complete quantitative data for all phases of trial court administration, civil and criminal, will be available, whereas up to this time only very limited material, not necessarily accurately secured, has been obtained. The second is that this is a coöperative study conducted by some twelve law schools, each conducting a unit of research in its own locality. Such coöperation among educational institutions has been all too rare in the past, and it is particularly fitting that it should occur in matters of important public service, such as this project is.'"

How Long Is a State Petition for Constitutional Convention Good?

THE very pertinent and important question of the force and validity of the various State petitions for a constitutional convention now on file is discussed in the report made to the New York Bar Association last January by the "Committee of Five to Look into and Report on the Several Proposals Pending in Congress to Amend the Federal Constitution." After listing the proposals in question and giving their status at present, the Committee report continues as follows:

"In our last annual report we noted that there had been filed with Congress under the provisions of Article V of the Constitution, petitions of 35 states (being more than two-thirds of the entire number), praying that a convention should be called to propose amendments to the Constitution and that they had not been acted upon by Congress.

"Article V of the Constitution provides as follows: 'The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-tourths thereof, as the one or the other mode of ratification may be proposed by the Congress; . . .'

"(The part of Article V omitted from the above quotation relates only to provisos which have no bearing upon the question considered below.)

"At the date of our last report detailed information as to the petitioning states was not available. At the Second Session of the 71st Congress, however, Senator Tydings presented to the Senate a compilation showing all of the applications for the calling of a constitutional convention which had been made to Congress since the adoption of the Constitution. The statement was printed as Document No. 78. It seems to show that 36 instead of 35 states have filed petitions. Upon the information contained in Senator Tyding's statement our report is based.

"The first petitions for a convention were filed in 1788 by Virginia and by New York in 1789. The petition of Virginia was filed after that state had ratified the Constitution. It recited the dissatisfaction with the Constitution which had been voiced in the State Convention, and requested that a convention be called to correct the errors which were pointed out. The petition of the State of New York was general in its terms and was probably filed for reasons similar to those which moved the legislature of Virginia. At the time of the presentation of the two petitions, the Union was composed of 13 states, and it would have required the requests of nine states to compel Congress to act under Article V. Not only in Virginia and New York, but also in other states, opposition to the ratification of the Constitution had been based upon dissatisfaction because there had not been included in the Constitution a bill of rights. That dissatisfaction was largely removed by the proposal by Congress and the ratification by the states on January 8, 1798, of the first ten amendments of the Constitution. In the preamble to the resolution of Congress proposing those amendments, it had been stated as follows:

"'The conventions of a number of the states having, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added, and as extending the ground of public confidence in the government will best insure the beneficent ends of its institution. . . .'

"After 1789 no further petition was filed for forty-three years. In 1832 Georgia filed a general petition to Congress for a convention. In the following year Alabama also filed a petition for a convention 'to propose such amendments to the Constitution as may be proper to restrain Congress from exerting the taxing power for the substantive protection of domestic manufactures,' that is to say, to prevent the adoption of a protective tariff policy. In the next 66 years no petition was filed. In 1899 the State of Texas in a petition making express reference to the desirability of the election of Senators by direct vote of the people, requested that a convention be called for 'proposing amendments to the Constitution of the United States.' After 1899 and down to 1911 petitions became numerous, amounting with the earlier petitions above referred to to 36 in the aggregate. Of petitions filed from 1899 to 1913 by 33 states, some confined the purpose of the convention to the adoption of an amendment for the election of Senators by direct vote of the people, and some extended the purpose to amendments generally. In the seven years from 1906 to 1913, 12 states filed petitions for a convention to propose amendments prohibiting polygamy. Since the year 1913 there have been filed no petitions for a convention, except that in 1929 Wisconsin repeated its request several times previously made.

"We have thus set forth the facts which seem to be material in considering whether, within the intent of Article V of the Constitution, 'application of the legislatures of two-thirds of the several states' has been made to Congress so as to impose upon it the duty to 'call a convention for proposing amendments.' The solution of this question must depend upon the further inquiry as to whether

there is any limitation of the period for which a petition of a state for a convention remains in force for the purpose of making up the two-thirds of the states as provided in Article V. The Article itself prescribes nothing upon the subject, and any limit would have to be implied. In considering what the implication should be it will be of assistance to consider the period within which an amendment to the Constitution proposed by Congress under the alternative provision of Article V must be ratified by the requisite number of states. That question was considered by the Supreme Court in Dillon v. Gloss, 256 U. S. 368. Article XVIII, being the prohibition amendment, expressly provided that it should be inoperative unless it was ratified by the several states 'within seven years from the date of the submission hereof to the states by the Congress.' It was held by the Supreme Court that ratification of amendments proposed by Congress must be made within a reasonable time, that Congress has power to determine what a reasonable time is and that the limit of seven years imposed by the Eighteenth Amendment was reasonable. In disposing of the case, the Supreme Court in a unanimous decision said:

" 'That the Constitution contains no express provision on the subject is not in itself controlling; for with the Constitution, as with a statute or other written instrument, what is reasonably implied is as much a part of it as what is expressed. An examination of Article V discloses that it is intended to invest Congress with a wide range of power in proposing amendments. . . . When proposed in either mode (i. e., by Congress or by federal conventions) amendments to be effective must be ratified by the legislatures, or by conventions, in three-fourths of the states, "as the one or the other mode of ratification may be proposed by the Congress. . . ."

" 'We do not find anything in the Article which suggests that an amendment once proposed is to be open to ratification for all time, or that ratification in some of the States may be separated from that in others by many years and yet be effective. We do find that which strongly suggests the contrary. First, proposal and ratification are not treated as unrelated acts but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that the amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the States, there is a fair implication that it must be sufficiently contemporaneous in that number of States to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do. These considerations and the general purport and spirit of the Article lead to the conclusion expressed by Judge Jameson "that an alteration of the Constitution proposed today has relation to the sentiment and the felt needs of today, and that, if not ratisfied early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress." (Note—The quotation is from Constitutional Conventions, by John Alexander Jameson, LL.D., 4th edition.) That this is the better conclusion becomes even more manifest when what is comprehended in the other view is considered, for, according to it, four amendments proposed long ago—two in 1789, one in 1810 and one in 1861—are still pending and in a situation where their ratification in some of the States many years since by representatives of generations now largely forgotten may be effectively supplemented in enough more States to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, and in our opinion it is quite untenable. We conclude that the fair inference or implication from Article V is that the ratification must be within some reasonable time after the proposal.'

"The reasons thus given by the Court for their conclusions are of almost conclusive weight in enabling us to determine the limit of time in setting in motion the machinery for the amendment by means of the convention method; for there is nothing in Article V to show that the matter of calling a convention should be open 'for all time' or that petitions for a convention in some states might be separated from those 'in others by many years and yet be effective.' On the contrary, the implications are the other way; for the calling of a convention would presumably be in response to a public demand, and it is not probable that the demand would continue unabated for an indefinite period. Indeed, it can be said of the convention method, as it was in Dillon v. Gloss, that the filing of the successive petitions by the several states are not to be treated as 'unrelated acts but as succeeding steps in a single endeavor.' As a consequence, the filing of the first and the last petition are not to be 'widely separated in time.' In other words, both methods of amendment prescribed by Article V presuppose that whichever is availed of it shall be completed within a time which is reasonable in view of the state of public opinion on the subject in the states. It is fair to assume that only 'when there is deemed to be a necessity therefor' will a convention be requested and the 'implication' will follow that the question whether a convention is to be called is to be 'considered and disposed of presently.' It may also be said, as the Court in Dillon v. Gloss said of the method of amending on the proposal of Congress, that the convention method should 'reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do.'

"Reasonableness in the time occupied in the process of amendment must depend upon the continuance of the conditions, political or otherwise, leading to the demand of the state. Where the conditions have changed or the necessity they have created for amendment has been satisfied, it may reasonably be presumed that the public demand for it has abated. Upon this principle it is not difficult to arrive at the conclusion that the petitions which were filed in 1788 and 1789 by Virginia and New York and which in a period of 43 years had not been renewed and in the purpose of which no other state had concurred, had ceased to be effective. The omission of any additional states to petition

fairly justifies the inference that the demand voiced in the petitions of Virginia and New York had been satisfied by the ratification of the first ten amendments. It would be absurd to bring the two petitions of 1788 and 1789 to the support of demands which commenced to be made 110 years later and for considerations which the people of the 13 states could not have anticipated. The same argument applies with reference to the petitions filed by Georgia in the year 1832 and by Alabama in 1833. One of these was general and the other was confined to the purpose of limiting the power of Congress to impose a protective tariff. To all four of these early proposals the language of Judge Jameson (Constitutional Convention, 586) in relation to the right of the states to vote upon amendments proposed by Congress, is applicable. He says:

" 'If they have that right (to ratify after a long interval) there are now floating about us, as it were, *in nubibus*, several amendments to the Constitution proposed by Congress, which have received the ratification of one or more States, but not of enough to make them valid as parts of that instrument. Congress could not withdraw them, and there is in force in regard to them no recognized statute of limitation. Unless abrogated by amendments subsequently adopted, they are, on the hypothesis stated, still before the American people, to be adopted or rejected.'

"Judge Jameson also mentions the instance referred to by the Supreme Court in Dillon v. Gloss, where the State of Ohio in 1873 sought to ratify one of the 12 amendments submitted to the states by Congress in 1789 which had then been rejected. He calls attention to the fact that in 1789 the states numbered only 13, whereas in 1873, when it was sought by Ohio to act upon the proposal made 80 years before, they numbered 38; and in support of the conclusion expressed by the Supreme Court that the effort of the legislature of Ohio was futile, he adds:

" 'And, supposing the right referred to exists, by what majority shall the resurrected amendment be adopted? If proposed in 1789, when the States numbered but thirteen, and when a majority of ten States might have ratified the amendment, how many would have been requisite in 1873, when there were thirty-eight states which would have been called upon to vote? If the answer should be, that twenty-nine states must have voted to ratify, since that number was three-fourths of all the States in 1873, however reasonable such an answer might seem, it would be founded upon no statute or custom of the country, and therefore different opinions as to its reasonableness might well be entertained. Hence the danger of confusion or conflict.'

"Considering, therefore (1) the long lapse of time since the presentation of the petitions of 1788, 1789, 1832 and 1833, (2) the absence of 'the sentiment and the felt needs of today' for the petitions of other historical and political eras and (3) the facts that there are now forty-eight states instead of thirteen, as there were in 1789, or 25 as there were in 1833, and that the petition of no state has been added in 43 years since the early petitions were filed, there can be no reasonable conclusion except that the states which made proposals for a convention before 1899 can not be counted to make up the two-thirds of the present number of states required to put the convention method in operation.

"But the petitions filed at intervals between 1901 and 1913 must also be considered. Fifteen of these petitions were confined to a request for a convention to propose an amendment for the election of Senators by direct vote of the people, twelve expressed a desire that the convention should also consider general amendments of the Constitution, two were general in their purpose and four were directed at the Constitutional prohibition of polygamy. The purpose of the states was thus sufficiently expressed and will go far to determine how long the petitions would remain effective. The petitions for the election of senators by the direct vote of the people showed a widespread public opinion favorable to that change. But they were not numerous enough to make it mandatory upon Congress to call the convention, and Congress removed the necessity for the convention method by responding to the prevailing sentiment and itself proposed Amendment XVII, which was speedily ratified, the ratification being proclaimed by the Secretary of State on May 31, 1913. The Committee, therefore, is of the opinion that as the purpose in filing the petitions for the popular election of Senators was satisfied, and as there has been a lapse of seventeen years without a renewal of the petitions, they have become ineffective. If the same conclusion is doubtful concerning petitions requesting a convention for general purposes, it is sufficient to say that the deduction of those petitions relating exclusively to the popular election of Senators would reduce the number of petitioning states substantially below the required two-thirds. Twelve petitions were filed in the seven years from 1906 to 1913, requesting a convention to adopt an amendment to prohibit polygamy, but in the opinion of the Committee they also have lapsed, because the public sentiment which led to the petitions has ended through legislation making polygamy a crime (U. S. C. A. Title 18, Sec. 513 [1884]) and denying citizenship to an alien practicing polygamy (U. S. C. A. Title 8, Sec. 364 [1906]), which for a long period has been effective to abate the evil.

"We conclude that the two-thirds of the states required under Article V of the Constitution to require Congress to call a convention, have not filed petitions requesting such a call.

HENRY W. TAFT, *Chairman;* WILBUR F. EARP, EDWARD G. GRIFFIN, WESLEY H. MAIDER, ROSCOE R MITCHELL, ISAAC R. OELAND, *Committee.*

December 31, 1930.

NATURE OF THE WORLD COURT'S JURISDICTION

In His First Opinion as a Judge of the World Court Judge Frank B. Kellogg Draws the Distinction Between Legal and Political Questions, as Applied to the Zones Case Between France and Switzerland—Orders of Court Suggest Analogy to American Case of Virginia vs. West Virginia

By Manley O. Hudson
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THE judges of the Permanent Court of International Justice seldom write individual opinions. The Court's action is always taken by the Court as a whole, and as Judge Hughes has explained,[1] opinions and orders of the Court represent the composite views of the judges. It is possible for any judge, however, to write a dissenting opinion;[2] and without dissenting, a judge may set forth his individual observations to be published with the views expressed by the Court as a whole. In the first case in which he has participated in the Court's deliberations, Judge Frank B. Kellogg has availed himself of this privilege, and in a separate statement of his "observations" he has called attention in a very useful and timely manner to the special character of the World Court as a strictly judicial body.

The Franco-Swiss Zones Case, in connection with which Judge Kellogg's "observations" are published, has been before the Court for more than a year. By a special agreement signed on October 30, 1924, and ratified on March 21, 1928, the French and Swiss governments agreed to submit to the Court the question whether as between France and Switzerland Article 435 of the Treaty of Versailles had abrogated or had for its object the abrogation of various treaty provisions regarding the customs and economic régime of the free zones of Upper Savoy and of Gex. It was further agreed that when the Court had concluded its deliberation on this question, the parties should be given a reasonable time to settle between themselves the new régime to be applied in the Zones, and failing an agreement, the Court should pronounce its judgment and settle all the questions involved in the execution of Article 435. The case first came before the Court on July 9, 1929, and on August 19, 1929, the Court handed down an order declaring that Article 435 of the Treaty of Versailles was not intended to lead to the abrogation of the various treaties establishing the free zones in Gex and Upper Savoy. The order was simply to the effect that the parties should have a period expiring on May 1, 1930, in which to seek an agreement by negotiation. A conference was opened at Berne on December 9, 1929, but the parties seem to have taken different views of the intent and effect of the Court's order, and the negotiations were interrupted on December 10, 1929. Thereafter no agreement was reached, and on April 29, 1930, the Court was informed of the failure.

The case again came before the Court at the extraordinary session which began on October 23, 1930. Some of the judges sitting on the Court at this time had not participated in the previous deliberations; opportunity was given to the parties to object on this ground, but both parties waived the point. Arguments were then heard by the Court, between October 23 and November 24, in the course of which the Swiss Government asked the Court to lay down a customs régime to be applied in the districts covered by the zones. The deliberations of the Court were completed on December 6, 1930, and they resulted in a new Court order.

The twelve judges were unanimous in the Court's conclusion that fresh opportunity should be given to the French and Swiss governments to attempt to reach an agreement by negotiation, and for this purpose a new period is given. The operative part of the order does not go beyond this; and the sustaining portion of the order lays it down quite clearly that at the conclusion of the fresh negotiations the Court will render a judgment, but that in its judgment it will confine itself to a declaration of the legal position of the parties. This seems to represent the view of but six of the twelve judges, however; for six other judges joined in a separate statement which partakes of the nature of a dissent from the considerations advanced by their colleagues. In this separate statement, the view was expressed that in its judgment to be delivered if the fresh negotiations fail, the Court will not be limited to a declaration of the legal position of the parties, but may if it sees fit, proceed to deal with the whole matter precisely as the parties themselves could deal with it—in other words, that the Court could lay down a customs régime for the territories in question.

Judge Kellogg did not share this latter view. He concurred in the operative parts of the order; but thinking that some of the considerations supporting it were so stated as to beget an argument that the Court might deal with political questions, he added his "observations" on the nature of the Court and the limits of its functioning. The following excerpts from his "observations" are particularly significant:

"This Court—a permanent court of international justice—has, in its Statute, a fundamental law defining the limits of the jurisdiction it may exercise. As aptly remarked, in the argument, by the Agent of the French Government (in connection

1. Charles E. Hughes, "The World Court as a Going Concern," 16 American Bar Association Journal (1930), p. 151.

2. Article 57 of the Statute of the Court provides that "dissenting judges are entitled to deliver a dissenting opinion." While this practice is not universally approved, it is in line with Anglo-American thought and has now become firmly established.

with another point, it is true), there are certain articles of the Court's Statute against which the provisions of the Special Agreement of the parties cannot avail. Every Special Agreement submitting a case to this Court must be considered to have, as tacitly appended clauses thereto, all the pertinent articles of the Court's Statute and must, in case of doubt as to its meaning, be interpreted in the light of such provisions of the Statute of the Court. The Agent of the French Government also cited the case of the Serbian Loans (Judgment No. 14) where the Special Agreement provided that after the decision of the Court upon the legal question as to the manner in which the bonds should be repaid, negotiations were to follow to determine whether or not considerations of equity did not require that certain concessions be made by the party in whose favor the Court gave its decision on the legal questions; and in the event of failure of the negotiations, this question was to be decided, *not by the Court,* but by a special arbitral tribunal set up by the Parties.

"It is evident from a consideration of the circumstances which called for the creation of this Court and the history of the organization, as well as from a careful examination of the Court's Statute, framed by a special committee of jurists appointed by the Council of the League of Nations, that this tribunal is a court of justice as that term is known and understood in the jurisprudence of civilized nations. The judges should be learned in the law, should be selected without regard to their nationality and should, in their administration of justice, be governed solely by the special or general rules or principles of law applicable to the case in hand. At the time this Court was created, it was felt that the setting up of a special arbitral tribunal for the solution of disputes of a judicial nature was an unnecesarily cumbersome and on the whole unsatisfactory manner of deciding such question; and it was desired that there should be an international court whose jurisdiction or competence should correspond to the common understanding of a court of justice. It was desired that this court should be permanent, and ready, at any moment, to hear and decide the legal differences of the nations. In view of the need this court was created to fulfill, and of the circumstances surrounding its organization, it is scarcely possible that it was intended that, even with the consent of the parties, the Court should take jurisdiction of political questions; should exercise the function of drafting treaties between nations or decide questions upon grounds of political and economic expediency. . . .

"What is a political question? It is a question which is exclusively within the competence of a sovereign state. The making of tariff regulations, the regulation of immigration, the imposition of taxes and, in short, the exercise of all governmental power necessarily inherent in a sovereign state, involve questions of this nature. In passing upon a political question there is no rule or principle of law, nor form of equity, justice nor even conscience, which the Court can apply; for, unless limited by treaties, the power of a state in this domain is unlimited. . . .

"While the importance of the settlement, by pacific means, of all disputes between nations should in no way be minimized, it is of the greatest importance that the prestige and influence of this Tribunal and the confidence which it should inspire among the nations as an impartial judicial body, wholly detached from political influence, should not be decreased or jeopardized, as would be the inevitable result of its assumption of jurisdiction over matters exclusively within the domain of the political power of a state. It seems to me incontestable that nothing could be more fatal to the prestige and high character of a great International Court of Justice than for it to become involved in the political disputes pending between nations; questions which may arise because of economic rivalry or racial, social or religious prejudices. No principle of law can be invoked for the settlement of such questions. That these political questions often lead to conflict and that the nations are pledged by the Pact of Paris to settle all differences by pacific means is undoubtedly true; but there is ample machinery for the adjustment of these questions; diplomacy, conciliation commissions and general arbitration are available for this purpose, whenever nations are willing to submit their sovereign rights to arbitration. But these questions of political or economic policy are within the sovereign jurisdiction of every independent state and should not and cannot be submitted to the International Court of Justice. There is also the League of Nations, which is a political conciliation body to which all the members may appeal. There is no need to impose upon the Court any such political questions destructive of its influence as a Court of Justice. The parties to this case are at liberty to submit the political questions involved therein to arbitration before arbitrators specifically chose for the purpose, if other means of settlement fail. . . ."

The two orders of the Court in this Franco-Swiss Zone case suggest an analogy to the case of Virginia vs. West Virginia in the Supreme Court of the United States.[2] In the latter case, the Supreme Court found it necessary repeatedly to open the door to further negotiations, for as Mr. Justice Holmes said, in one of the many opinions, "Great States have a temper superior to that of private litigants, and it is to be hoped that enough has been decided for patriotism, the fraternity of the Union, and mutual consideration to bring it [the case] to an end." Similarly, the World Court finds it necessary in the Franco-Swiss Zones Case to proceed with great caution, advancing toward a final decision only after the parties have had repeated opportunity for fresh negotiations. Indeed, "Great States have a temper superior to that of private litigants."

2. (1907) 206 U. S. 290; (1908) 209 U. S. 514; (1911) 220 U. S. 1; (1911) 222 U. S. 17; (1913) 231 U. S. 89; (1914) 234 U. S. 117; (1915) 238 U. S. 202; (1916) 241 U. S. 531; (1918) 246 U. S. 565.

Gift for Ohio Judicial Administration Study

Baltimore, Md., Feb. 8.—A gift of $150,000 has been made to the Institute of Law of Johns Hopkins University by civic and industrial leaders in Ohio, Dr. Joseph S. Ames, president of the university, announced tonight. The gift is to enable continuance of a study of the judicial administration in Ohio.

THE ENGLISH COURT OF CRIMINAL APPEAL

Speed of Determination, Brevity of Opinion, Paucity of Judicial Rhetoric, Concentration on the Outstanding Issues of Fairness and Legality of Defendant's Trial and Reasonableness of Jury's Verdict Are Salient Characteristics of Tribunal's Work—This Bold Experiment May Be Studied With Profit Here*

By Pendleton Howard
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THERE is probably no feature of the English administration of justice which illustrates in more convincing fashion the fundamental differences between the criminal procedure of that country and that of the United States than the conduct of criminal appeals. Speed of determination, brevity of opinion, paucity of judicial rhetoric, concentration on the outstanding issues of the fairness and legality of the defendant's trial and the reasonableness of the jury's verdict—these are the salient characteristics of the work of the English Court of Criminal Appeal. May we not in the United States, where there is such growing and widespread conviction that the machinery of law enforcement has broken down, study with some profit this bold administrative experiment which, to a very large extent, has revolutionized criminal law administration in England?

The Court of Criminal Appeal was established by the Criminal Appeal Act of 1907.[1] The law was enacted only after parliamentary discussions on the subject which had lasted some three-quarters of a century and it was the immediate result of the public furore over the miscarriage of justice in the notorious Adam Beck case. During this period no less than twenty-eight separate bills dealing with the topic of criminal appeal were introduced in Parliament to no avail. Prior to the passage of the law there was no right of direct appeal from the verdict of a jury on the merits of the case, and not even on a point of law unless the judge of the trial court saw fit to "state a case"—a mode of procedure which may still be, and frequently is, resorted to in trials at Quarter Sessions and courts of summary jurisdiction.[2] The Beck case focused the attention of the country on the necessity of a prompt and adequate method of reviewing convictions on indictment, criminal information or coroner's inquisition.

The old method of appellate procedure followed in the trials of indictable offenses at the Assizes, Central Criminal Court of London and Quarter Sessions was outlined by the Crown Cases Reserved Act of 1848.[3] This Act provided that upon conviction of any person of treason, felony or misdemeanor before any court of *oyer and terminer*, or gaol delivery (i. e. the Assizes and Central Criminal Court), or Court of Quarter Sessions, the judge or judges before whom the case was tried, could, in his or their discretion, reserve any question of *law* which arose during the trial for the consideration of the Court for Crown Cases Reserved (a tribunal brought into existence by this Act); and the judge or judges could then respite execution of the judgment until such question was considered or decided; while the matter was pending the defendant was either committed to prison or released on bail, the action taken in this respect being discretionary with the trial court. If the Court for Crown Cases Reserved thought that the point of law had been wrongly decided at the trial, the verdict was set aside and the conviction quashed. But it will be observed that a case could be stated on a point of *law* only and that the judge could not be compelled to state it if he did not wish to do so. Moreover, such an appeal could be taken by the defendant only, not by the Crown. Prior to the establishment of the Court of Criminal Appeal, the annual number of cases stated averaged only eight.[4] By the Supreme Court of Judicature Act of 1873,[5] this jurisdiction of the Court for Crown Cases Reserved was transferred to the judges of the King's Bench Division of the High Court of Justice—that is, the lower section of the Supreme Court of Judicature.

The Act establishing the Court of Criminal Appeal[6] materially alters this whole procedure by providing that all appellate jurisdiction previously exericised by the judges of the High Court under the Crown Cases Reserved Act of 1848 shall henceforth be vested in the Court of Criminal Appeal, but that in any case arising in the future where a person convicted appeals against his conviction on a question of *law alone* the court may, if it thinks fit, follow the procedure outlined in the law of 1848 and require a case to be stated in the same manner as if a question of law had been reserved at the trial. As a matter of fact, however, the old procedure is seldom, if ever, resorted to; all questions of law invariably come before the Court of Criminal Appeal as ordinary appeals, and not as cases stated.

The Court of Criminal Appeal consists of the Lord Chief Justice of England and all the puisne judges of the King's Bench Division. The court is properly constituted when there are as many as three judges present; but whatever the number it must be uneven, and the decision of the majority prevails. The court sits at the Royal Courts of Justice in London, and in practice, unless the case is of unusual importance, only three judges are present at the hearings. In some thirty or forty cases since the court was created, it has con-

*The statements and conclusions in this article are the result of observation and study of the English system by Prof. Howard during a stay of several months in England.—Editor.

1. 7 Edw. VII, c. 23.

2. Of course, if the defect upon which the defendant relied appeared *on the face of the record*, he could apply to the Attorney-General for leave to issue a *writ of error*, which could be argued in the King's Bench Division and carried up to the Court of Appeal—that is, the upper section of the Supreme Court of Judicature—and thence to the House of Lords for final decision. This practice, however, was but seldom made use of and was specifically abolished by the Criminal Appeal Act, s. 20 (1).

3. 11 & 12 Vict. c. 78, s. 1.

4. See *Kenny, Outlines of Criminal Law*, (12th ed., London, 1926), 425.

5. 36 & 37 Vict. c. 66, s. 47; repealed and reenacted by the Supreme Court of Judicature (Consolidation) Act, 1925, 15 & 16 Geo. V, c. 49.

6. s. 20 (4).

sisted of more than three judges; in one case it consisted of thirteen judges. The Lord Chief Justice always sits if possible, and when he sits, presides. The court sits on an average about forty days each year. Only one judgment is rendered except "where, in the opinion of the court, the question is a question of law on which it would be convenient that separate judgments should be pronounced by the members of the court."[7] The court has appellate jurisdiction over all criminal cases tried at Quarter Sessions, the Assizes, the Central Criminal Court, and in the King's Bench Division, whether on indictment, criminal information or coroner's inquisition. Thus, contrary to the prevailing practice in the United States, criminal appeals are heard and determined by the same judges who try the more important indictable offenses at the Assizes and Central Criminal Court,[8] although, of course, it is arranged among the judges that the judge who tried the case in the first instance does not sit on the appellate court when it is being argued on appeal.

A defendant convicted of an indictable offense may appeal against his conviction in the following cases: (1) on any ground involving a question of law alone, whether the question was raised by the defendant in the court below or not; (2) on any ground involving a question of fact alone, or a question of mixed law and fact, or any other ground which appears to the court to be sufficient, either by leave of the Court of Criminal Appeal or upon a certificate of the judge who tried the action that it is a fit case for appeal, and (3) against the sentence imposed upon the defendant by the court of trial, but only upon obtaining leave from the Court of Criminal Appeal, and only if the sentence is not one fixed by law.

Appeals, or applications for leave to appeal, must be filed within ten days of the date of conviction, unless the time is extended by the Court of Criminal Appeal; and there is no power to extend the time for appeal in cases of conviction involving sentence of death. The notice of appeal, or the application for leave to appeal, must be signed by the appellant, except in certain cases, when it may be signed by his solicitor or some other authorized person. It must be addressed to the Registrar of the Court of Criminal Appeal. Governors of the prisons inform convicted prisoners of their rights under the law and furnish them with instructions and forms of appealing.[9]

It is the duty of the Registrar to obtain and lay before the court all documents, exhibits and other things relating to the proceedings in the court of trial which appear necessary for the proper determination of the appeal or application. These include a transcript (and a carbon copy) of the stenographic notes of the proceedings at the trial. Copies of the transcript and of other necessary documents for the use of the judges and of the Director of Public Prosecutions are afterward made. No official shorthand note, however, is as yet taken of the proceedings or judgments of the Court of Criminal Appeal itself. Such a note, in fact, is never taken unless a stenographer is specially instructed by some person interested in some particular case.

Leave to appeal will be given in all cases where a *prima facie* case for further inquiry is made out. A single judge, who does not sit in open court, has power to grant or refuse such leave and to deal with other subsidiary applications. In the event an appellant's application is refused, however, he is entitled to have his petition heard by the full court. In practice, applications for leave to appeal are usually determined in the first instance by a single judge. Many cases never reach the full court at all. Appellants have the absolute right to abandon their appeals or applications and many exercise this right. Sometimes an appeal is abandoned before the case is considered at all, either by a single judge or by the court; sometimes after the single judge has refused leave to appeal.[10]

The Act provides that the Court of Criminal Appeal shall allow an appeal against conviction if it thinks the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported by the evidence or resulted from a wrong decision on any question of law, or if it thinks that on any ground there was a miscarriage of justice. In all other cases it must dismiss the appeal; and in this connection it is provided that even though the court is of the opinion that the point raised might be decided in favor of the appellant, it may still dismiss the appeal if it considers that "no substantial miscarriage of justice has actually occurred."

If the court allows the appeal, it can quash the conviction and direct a judgment of acquittal to be entered. It may affirm the sentence passed, or substitute another sentence in a case where the appellant, though not properly convicted on one count of an indictment, has been properly convicted on some other count. Where the defendant was improperly convicted of one offense and the jury could, under the indictment, have found him guilty of some other offense, and it appears to the court that the jury, on their findings, must have been satisfied that the evidence proved him guilty of that other offense, the court can substitute for the verdict found by the jury a judgment of guilty of that other offense and pass sentence accordingly, provided the sentence is not of greater severity.

The prisoner can appeal against the sentence imposed upon him by the trial court, but only upon obtaining leave from the Court of Criminal Appeal, and only if the sentence is not one fixed by law. If the court thinks that the sentence is too severe, it can shorten it. In appealing against sentence the defendant runs some risk, however, for the court may, if it sees fit, quash the sentence appealed from and inflict a more severe penalty. This power is given the court in order to discourage frivolous appeals and to enable it to correct what it considers to be either undue severity or unwise leniency in the sentence appealed from. As a matter of fact, the power to increase sentences has been infrequently exercised. "During the past nineteen years," said Lord Chief Justice Hewart, "sentences have not, I think, been increased in more than fourteen cases. And in every case of increase of sentence, an appellant has always been expressly warned by the court before-

7. s. 1 (5).

8. It should be noted that under a series of Parliamentary enactments culminating in the Criminal Justice Act, 1925, 15 & 16 Geo. V, c. 86, courts of summary jurisdiction (i. e. benches composed of lay justices of the peace in the great majority of boroughs and counties, but in London and a few of the larger cities courts presided over by professional police court magistrates) may now, with the consent of the accused, hear and determine certain classes of *indictable* offenses, which were formerly triable only before juries. For a discussion of the declining importance of the English criminal jury see my article *Trial by Jury, Century Magazine*, (April, 1929), 683 *et seq.*

9. Lord Hewart, the present Lord Chief Justice of England, is authority for the statement that barely seven per cent of the total number of convicted persons exercise the right of appeal. "The highest number of appellants was," he said, "in the year 1910, when there were 713 appellants. An examination of the record shows that the number of appellants has ranged from 712 to 430 or thereabouts in a year, with an average of something like 530, while the number of cases in which the conviction was quashed has ranged from 39 to 14, and the number of cases in which the sentence was reduced has ranged from 47 to 17 in a year." (Extract from an address delivered at the twelfth annual meeting of the Canadian Bar Association at Toronto, August, 1927).

10. "During last year, for example, 101 appellants abandoned their appeals or applications—fifty-seven before their cases had been considered at all by either the single judge or by the court, 44 after the single judge had refused leave to appeal." (From the address by Lord Hewart, *op. cit. supra.*)

hand of its power, and the appellant has therefore had the opportunity of abandoning his appeal."[11]

As already indicated, the court may, if it thinks proper, dismiss the appeal altogether; and in this connection it may be well to emphasize that even though the court is of the opinion that the point raised might be decided in favor of the appellant, it may dismiss the appeal if it considers that "no substantial miscarriage of justice has actually occurred."[12]

The court is empowered, in a proper case, to hear fresh evidence, and it sometimes does so. But it has no power to order a new trial, for the Act provides that "writs of error, and the powers and practice now existing in the High Court in respect of motions for new trials or the granting thereof in criminal cases, are hereby abolished."[13] It has been held, however, that where the Court of Criminal Appeal holds that the trial of an appellant has been a nullity it has power to order the prisoner to be tried on the indictment in question; in such a case it may grant a writ of *venire de novo*, that is, an order to summon and swear a fresh jury to try the case.[14]

The average time that elapses from the receipt by the Registrar of a notice of appeal, or an application for leave to appeal, until the hearing of the appeal by the court, is from four to five weeks.[15] During the interim the prisoner cannot obtain a certificate of reasonable doubt or be admitted to bail; he remains in prison. There is no delay incidental to the preparation of lengthy printed memoranda or briefs on appeal, as in the United States. The English record on appeal consists merely of the transcription of the stenographic record and documents of the trial. Printed arguments based on this stenographic record are not utilized because they are conceived to be a waste of time and energy. Most opinions of the court are very short—rarely more than two or three typewritten pages in length—and there is no attempt in them to display legal erudition. They are customarily rendered orally by the presiding judge immediately at the conclusion of the arguments of opposing counsel.

The Act creating the Court of Criminal Appeal vested in the Director of Public Prosecutions additional duties of exceptional importance.[16] He is directed by the terms of the law[17] to appear for the Crown on every appeal to the Court of Criminal Appeal except in those cases when the defense of the appeal is undertaken by the solicitor of a government department or by a private prosecutor.[18] The latter, however, are effectually discouraged from undertaking the defense of criminal appeals by the section of the Act[19] which provides that upon the hearing of an appeal, or any proceedings preliminary or incidental thereto, costs are not to be allowed on either side. Private prosecutors are almost always willing, because of this provision, to have their cases on appeal defended by counsel representing the Director of Public Prosecutions without any expense to themselves. Moreover, even though a private prosecutor undertakes to defend the judgment on appeal he runs the risk of being subsequently displaced by the Director, for regulations under the Act[20] provide that the Court of Criminal Appeal may, at any stage of the proceedings, if it thinks proper, order the Director of Public Prosecutions or the solicitor to a government department to take over the defense of the appeal and be responsible for its further conduct. The effect of the several provisions of this Act has been to entrust the Director with the major portion—roughly ninety per cent—of the work of defending judgments of conviction in the Court of Criminal Appeal.[21]

When the Registrar of the Court of Criminal Appeal has received a notice of appeal (as distinguished from an application for leave to appeal), or when leave to appeal has been granted to any appellant, the practice is for the Registrar first to ascertain whether the private prosecutor intends to undertake the defense of the appeal. If the latter declines the Director is notified forthwith and all papers in the case, including the transcript of the testimony adduced at the trial, are furnished his office free of charge. Of course if the Director himself is the original prosecutor, he is notified in the first instance. The regulations further provide that it shall be the duty of the prosecutor who declines to undertake the defense of an appeal to furnish the Director and the Registrar, or either of them, any information, documents, matters and things in his possession or under his control connected with the proceedings, which they may require for the purposes of their duties under the Act.

In those cases where the appeal is against sentence only, it is the practice for the Court of Criminal Appeal to give the Director a free hand in determining whether or not it is advisable for his office to be represented by counsel at the hearing of the appeal. As soon as leave to appeal against sentence has been granted, therefore, the Registrar sends the Director all the papers in the case, including a copy of the application for leave to appeal and a transcript of the evidence at the trial, so that his department may be fully advised of the attendant circumstances. If the Director decides that the case is of sufficient importance to require his intervention, or is of the opinion that he can in any manner assist the court in reaching a proper decision in the matter of sentence, he instructs or "briefs" counsel to appear for the Crown at the hearing. The question of sentence is ordinarily one in which the court does not need, or desire, the assistance of counsel for either prosecution or defense.[22] The judges have all the facts before them and have had long experience in dealing with problems of punishment. It sometimes happens, however, that the Direc-

11. Address by Lord Hewart, *op. cit. supra.*
12. s. 4 (1).
13. s. 20 (1).
14. Rex v. Crane (1921), 15 Cr. App. Rep. 183, 85 J. P. 245.
15. Information from the clerk of the Court of Criminal Appeal. See also on this point the address of Lord Hewart before the Canadian Bar Association, *op. cit. supra.*
16. The office of Director of Public Prosecutions was created in 1879 with the passage of the Prosecution of Offenses Act of that year (42 & 43 Vict. c. 22). In 1884 the office was merged with that of Solicitor to the Treasury, but in 1908 the two were again separated by the Prosecution of Offenses Act (8 Edw. VII, c. 73). The number of cases instituted and carried on by the Director is, and always has been, small in comparison with the total number of indictable offenses prosecuted and disposed of in the criminal courts. For a full discussion of the administration of the office of the Director of Public Prosecutions see my two articles *Criminal Prosecution in England I*, 29 *Columbia Law Review*, 715 *et seq.* (1929), *II*, 30 *ibid.* 19 *et seq.* (1930).
17. s. 12.
18. In England, the prosecution of criminal offenses, save in those special classes of cases which are conducted through the agency of governmental officials such as the Law Officers of the Crown (the Attorney-General and the Solicitor-General), the Director of Public Prosecutions or the solicitors to the government departments and boards, is in legal theory left wholly to the agency of private individuals (i. e. the persons injured, who are termed "prosecutors"). These private individuals are not compelled to set the law in motion and have only within comparatively recent years been encouraged to do so by legislative provisions authorizing the repayment on a still inadequate scale of the costs of the actions out of public funds. While the ordinary run of criminal prosecutions is instituted and caried on by the police, it is nevertheless true that a considerable number of prosecutions is carried on through the agency of private persons. These proceedings are therefore termed "private prosecutions." For a discussion of this topic, see my articles *Criminal Prosecution in England, op. cit. supra.*
19. s. 13. See also Costs in Criminal Cases Act, 1908, 8 Edw. VII, c. 15, s. 9 (5).
20. St. R. & O. (1908), no. 297, s. 28, at 251-52.
21. See *Criminal Statistics, England and Wales* (1927), Cmd. 3301, at 72-73, 98-101.
22. The appellant, however, is entitled to brief counsel on any appearance before the court, whether against sentence or conviction. Legal aid is seldom granted in appeals against sentence only. (Information from the clerk of the Court of Criminal Appeal.)

tor has been furnished information by the police with respect to the defendant's record which was not available at the time sentence was passed in the court below, or has received other advices which bear on the question of punishment. In such cases the Director notifies the Registrar that counsel has been instructed to appear on behalf of the Crown, and the police officer or any other witness may be called on to give evidence at the hearing, if the court deems it advisable to hear him. In the great majority of appeals against sentence only, however, the Director does not instruct counsel. And in those cases where the court grants leave to appeal against both conviction and sentence, counsel briefed by the Director appears at the hearing to defend the conviction only.

In preparing the defense of an appeal it becomes necessary for the Director's office to examine the record of the trial, investigate the legal points involved, and prepare a brief for counsel's guidance at the hearing. As already pointed out, however, it is not the practice to prepare printed briefs or other arguments for submission to the court. It may be that the court has already indicated, in granting leave to appeal, the questions which it considers to be of paramount importance in the appeal; these points are, of course, the ones which receive most attention in the brief, although counsel may be instructed on other matters as well.

In the appeals of those cases in which the Director was the original prosecutor, it is the invariable practice for him to brief the same counsel who appeared at the trial; and this is true even though more than one counsel may have conducted the trial. In those appeals in which the Director was not the original prosecutor, it is also customary to offer the brief to trial counsel. Should he decline the proffer, a counsel who holds a permanent appointment from the Crown is instructed in his stead. It may happen in some cases that where a junior barrister only has represented the prosecution at the trial, the Director may see fit to instruct a King's Counsel, or leader, together with the junior, to argue the case on appeal. But this is not likely to occur unless the case is of exceptional gravity or presents legal questions of unusual importance.

The task of defending an appeal from a judgment of conviction is not onerous, since the court as a rule calls upon Crown counsel only when the arguments presented by appellant's counsel leave it in doubt as to the legal points involved. It is a common occurrence for the presiding judge to inform counsel for the prosecution that no argument is necessary. This does not necessarily, imply, however, that the conviction will be affirmed, especially if it is a case in which leave to appeal has been granted by the court, or one of the judges thereof. For such leave is not likely to be granted unless the grounds of appeal are of a substantial nature.

Since no costs are allowed on appeal, the Director must of necessity make use of his own departmental funds in order to provide compensation for his counsel. The amount of the fee depends upon the character and importance of the prosecution.[23]

The Court of Criminal Appeal has now been in existence a little more than twenty years. So far-reaching have been the results of its work and so effectively has it performed its functions that it is difficult to understand why so many competent and experienced critics of law administration in England protested against its institution. It seems incongruous to the present generation of Englishmen that before the passage of the Act of 1907 a Court of Appeal existed where pecuniary interests were in dispute, but that none existed for the benefit of the convicted defendant whose liberty or life was at stake. The operation of the court has unquestionably increased public confidence in the just administration of the criminal law by correcting a considerable number of errors into which the courts below had fallen in particular cases. Its judgments, moreover, have tended to create a standard throughout the country for the administration of criminal justice and to introduce some measure of uniformity in the character of sentences. The advantages of the court have been aptly summarized by the present Lord Chief Justice, Lord Hewart, as follows:

"Competent observers in general perceive not merely the utility of the court but, indeed, its necessity. It is not so much that a conviction is sometimes quashed or a sentence is sometimes reconsidered. What matters, and matters profoundly, is that everybody engaged in administering the criminal law, upon whatever rung of the ladder he may be, throughout the whole hierarchy, is well aware that a Court of Criminal Appeal is in existence. The consequences of that diffused and abiding knowledge are quite incalculable. . . If anyone has any real doubt about the matter, let him contrast and compare, for example, the summing up in a criminal case tried today with the summing up in a criminal case tried fifty, forty, or even twenty-five years ago. Speaking for myself, at any rate, I have not the smallest doubt that, among the many duties which belong to the Lord Chief Justice of England, there are none more important than his duties connected with the Court of Criminal Appeal."[24]

23. The average fee is from five to seven guineas ($25 to $35) in each case. In country prosecutions, therefore, it is entirely possible that a trial counsel who accepts an appeal brief may spend more on his travelling expenses to and from London than the amount of the fee he earns in representing the Crown.

24. Address before the Canadian Bar Association, *op. cit. supra.*

International Conference of Comparative Law

THE following resolutions passed at the annual meeting of the International Academy of Comparative Law, at The Hague on August 2, deal with the plan for an international conference under its auspices in 1932:

"At the annual meeting the Academy took note with the greatest satisfaction of the considerable measure of success already obtained in the promotion of the projected conference, in which many persons and scientific bodies in all countries have manifested their interest.

"After hearing the reports of Professors Balogh and Lambert, the Academy decided as follows:

"(1) The International Congress of Comparative Law will be held at the Hague from 2-6 August, 1932.

"(2) Each person taking part in the Congress will pay a subscription of 12 florins, payment to be made for the Account of the Academy, to the Rotterdamsche Bank Vereeniging, Utrecht. Persons or societies wishing to take part in the conferences are requested to register their names with Professor Elemér Balogh, Artillerie Strasse 12, Berlin N.24.

"(3) The Congress will comprise:

"(a) *General Section*, in which will be studies of (1) The existing condition of each branch of law from the point of view of Comparative Law, and (2) The organization of a centre of international juridical documentation.

"(b) *Special Section*, in which a few questions presenting a special practical interest will be discussed.

(4) Details of program and organization will be considered by the bureau at its next meeting in January, 1931. It is contemplated that the program schemed be definitely settled at the next session of the Academy."

CONSTITUTIONAL DUTIES AND INADEQUATE ENFORCEMENT MACHINERY

Factors Precluding Enforcement of Constitutional Duties Through Legal Machinery—Mandatory Congressional Duties Held Non-Enforceable—Compelling Congressional Action With Respect to State Duties—Constitutional Omissions — Trespassing by Co-Equal Powers of Government—Discretionary Powers, Etc.

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THE Federal Constitution draws a distinction between imperative duty in the discharge of governmental power conferred upon the Central Government, and discretionary power in the execution of various functions of government. The Fundamental Charter also abounds in generalities of phraseology relating to powers delegated and broad definitions of powers within the internal functions of government. These two generalizations make for considerable difficulty in the administration of governmental affairs because of the lack in the Constitutional framework of concrete and appropriate legal machinery for clarifying distinctions or for enforcement of imperative duties. Perhaps only this omnibus method of broad generalization, and this inadequate provision for legal enforcement of duties, were the most feasible arrangements in a fabric of government under a written constitution which, in the words of Chief Justice Marshall, was to "endure for ages to come" and which would, furthermore, be judicially "adapted" from time to time as the judicial process dealt with the varying exigencies of national life.[1] On the other hand, it must not be overlooked that the Constitution was drafted on a theory of "automatic" control of the functions as well as the divisions of power within the Federal State, under the notion of a "higher law" beyond and above the Constitution, which dictated and compelled governmental action as well as restrained it.[2] Saturated with the doctrines of Coke, Blackstone, Locke, and Montesquieu, and with the general background of Magna Carta and the Common Law idea of static rights and duties, the Framers of the Federal Government envisaged a higher law of morals as the wellspring of sanction impelling action on the part of governmental administrators and legislators in the discharge of duties imposed by the Constitution. High-mindedness would cooperate with self-interest of those in the lower plane of so-called political strategy; statesmanship of the few would join forces with those interested largely in obtaining re-election to office and who would discharge constitutional duties of government as a means toward that end. But this idealistic theory of governmental sanction would not be feasible in the event pronounced decay occurred in political leadership, so that some other method would have to be invoked to compel performance of governmental duties. Thus the judiciary was invested with certain powers, but up to a given limit only, where it was contemplated disputes of jurisdiction between Federal and State Governments might be settled, or where generally unconstitutional acts of government might be challenged and, if necessary, restrained by prohibiting officials of government from acting thereunder.[3] But, as will be indicated, numerous gaps have developed, making for inadequate judicial enforcement of constitutional duties.

Factors Precluding Enforcement of Constitutional Duties Through Legal Machinery

Usually, there will be a number of factors making for these non-enforcible situations. In the first place, no case or controversy may be possible in order to obtain judicial recognition of a dispute, for example, between coordinate branches of government within, particularly, the orbit of Federal power.[4] This is the problem of inability of initiating legal proceedings in the first instance. In the second place, granted a case or controversy, so that the issue can be framed and the subject-matter taken cognizance of by the proper judicial tribunal, the latter may sidestep the question presented, if it can possibly do so, out of a principle of respect for the acts of a co-equal power in government, or under the broad doctrine, the limits of which are by no means today settled, of judicial non-review of so-called "political" questions.[5] The latter device is of such latitude that it will be inclusive of situations where the courts consciously feel that they are inadequate, in their legal-machinery, in obtaining enforcement of a judgment or decree even if it were rendered. This is the problem of judicial neutrality, more or less vague and difficult of prediction. It will not always be articulately expressed in judicial opinions, but it will be obscurely there, or it will be the major premise, the intuitive judgment of decision. From these observations, it will be perceived that considerable latitude is afforded

1. In McCulloch v. Maryland (1819) 4 Wheaton, 316, Marshall further said, in the course of his opinion: "A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public."

2. Corwin, "The Higher Law Background of the Constitution," 42 Harvard Law Review, 149, 365.

3. Even today the accepted doctrine of the judiciary, in overthrowing unconstitutional legislation, is that no effect in rem is had on the statute, but only an in personam effect, i. e., parties claiming to act under the void statute are prohibited from doing so.

4. Within the doctrine of Muskrat v. United States (1911) 219 U. S. 346. Of course, this requirement is applicable only of constitutional courts. Cf. Ex parte Bakelite Corporation (1929), 279 U. S. 438.

5. M. F. Weston, "Political Questions," 38 Harvard Law Review, 296; Finkelstein, "Judicial Self-Limitation," 37 Harvard Law Review, 338.

to the other branches in government in refusing to discharge constitutionally imposed duties, or discharging them, perhaps, in an unconstitutional manner. The third problem is that of the growth of "extra-constitutional" expedients, those practices and usages of governmental action that are not prohibited by the constitutional design of government; but which are inevitable by-products of practical government, in that they lubricate the wheels of government and keep it functioning as a vehicle of national political life, accomplishing the ends of government. It is probably not exaggerated to say that these developments of government "beyond the pale" of constitutionality are slowly, but surely, evolving practices as well-established as though embodied expressly in the fundamental constitutional document.[6]

Mandatory Congressional Duties Held Non-Enforcible

There are a number of duties imposed on Congress by the Constitution for which there has thus far in our national history been no legal machinery appropriate as an enforcement agency. These are mandatory duties, and not discretionary powers, to act or not to act. They were so regarded in the debates in the Constitutional Convention of 1787,[7] and the phraseology would seem to admit of no doubt that they are thus to be construed. Article V of the Constitution provides: "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several States, *shall* call a convention for proposing amendments." So far as is known, there have been no attempts made up to the present time seeking the aid of legal machinery to compel the calling by Congress of a constitutional convention where two-thirds of the several States had made the necessary application. There would be difficulty, in the first place, in determining when the two-thirds number had petitioned Congress, whether they should be for specific or general amendments, and for how long a period of time these petitions would be regarded as existing if not simultaneously submitted. The determination of these questions would be useful smokescreens for judicial neutrality in refusing to compel enforcement. And, of course, on the other hand, under the decisions, there would be grave doubt whether performance of such a duty would be undertaken by judicial compulsion, because no case or controversy, or because beyond judicial enforcement. Thus, judicial neutrality would negate enforcement. The same difficulty would not be experienced so far as legal non-enforcement were concerned, in those situations where Congress is under a duty not to act, for here the judiciary would merely restrain the enforcement of an act or statute violative of the Constitution.

Again, regarding reapportionment of the members in the lower House of Congress, the provisions are: "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed" (Article XIV, sec. 2) and "the actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and *within every subsequent term of ten years*, in such manner as they shall by law direct." (Article I, sec. 3). It is a matter of common knowledge, in fact, of notorious knowledge, that the present apportionment of seats in the House of Representatives has not been altered since 1910, ignoring the census of 1920.[8] By the Act of 1929, Congress has, at last, undertaken to perform its constitutional duty by empowering the President to fix the reapportioned membership within two years, unless the Congress in the interim takes action. But nothing was ever done about compelling performance of this mandatory provision for the plain reason that nothing could be done about it through legal machinery. In one or two of the constituent States, injunctive proceedings were instituted by interested parties seeking to restrain legislative acts enacted by a legislature that had refused to reapportion its membership, the contention being that the legislation was void.[9] But the courts have been cautious to enjoin such legislation, on the ground that, having no affirmative power to compel performance of legislative duty, there was equally no indirect power to accomplish the same result.[10] The same notion has been behind judicial neutrality with respect to the duty of the lower House of Congress.

Compelling Congressional Action With Respect to State Duties

There are certain constitutional duties imposed on the Central Government with regard to impelling or restraining action on the part of the constituent States that might be invasions of rights of persons protected by the Federal Constitution. Here it has been charged there have been evasions of congressional duty, which could not be remedied through legal machinery. Article IV, in part, provides: "A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, *shall*, on demand of the executive authority of the State from which he fled, *be delivered up*, to be removed to the State having jurisdiction of the crime." Although there is no express mandatory duty imposed on the Central Government to compel enforcement of this provision with respect to interstate rendition,[11] it was not contemplated that the asylum State should be the sole judge in the event a sister State sought extradition of a fugitive from its own justice. The Fourteenth Amendment, of course, imposes certain restrictions on State action, which Federal courts will compel the constituent States to observe, in a negative way, by striking down invalid legislation. But to compel rendition of a fugitive from justice to another State requires an impartial, but coercive, central authority such as the Federal Government.

6. I have discussed these developments in a forthcoming article in the California Law Review.

7. Elliott, "Debates," vol. 4, p. 184 (1836 ed.).

8. Chaffee, "Congressional Reapportionment," 42 Harvard Law Review, 1015. Professor Chaffee refers to the duty of Congress to reapportion as "an imperfect obligation," one where the duty is defined, but the sanction withheld.

9. Fergus v. Marks (1926) 321 Illinois, 510, and Fergus v. Kinney (1929) 333 Ill. 437. But see State ex rel. Adams County v. Cunningham (1892) 81 Wis. 440, and State ex rel. Lamb v. Cunningham (1892) 83 Wis. 90.

10. It is well settled, of course, that the judiciary are without affirmative power to compel a legislature to perform a legislative act. Cf. Person v. Doughton (1923) 186 N. C. 723, and Henry v. Cherry (1909) 30 R. I. 13, at p. 38.

11. In Kentucky v. Denison (1860) 24 Howard, 66, Taney, C. J., held the Federal Government without coercive power to compel the asylum State to deliver the fugitive from justice to the extraditing State. The Fourteenth Amendment had not then been adopted. And see W. C. Coleman, "The State as Defendant," 31 Harvard Law Review, 210, 229.

And Congress has recognized this implied constitutional mandate by enacting in section 5278 of the Revised Statutes that where certain formal steps have been taken by the State officials in the State whence the fugitive from justice fled, the asylum State must permit the criminal to be extradited. The exact words of sanction are: *"It shall be the duty* of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured . . . and to cause the fugitive to be delivered" to the demanding State. The phraseology is quite similar to the more condensed wording in the Federal Constitution itself. No concrete method of legal enforcement is provided; no penalties imposed, if such were constitutionally possible. Perhaps the Congress is justified in its treatment of this problem, in view of the uncertain nature of the duty imposed upon it, as well as the doubtful area of its power to enforce the mandates upon the asylum State, in view of the Tenth Amendment to the Federal Constitution restraining Federal action within the so-called "reserved" powers of the States. That the Federal judiciary have numerous grounds for declaring neutrality in the event of requested action compelling performance of these vague congressional duties, must be plain. Performance such as there is today probably is found in those judicial tribunals where the extraditing State is seeking the fugitive from the custody of State officials in the asylum State, or seeking review of the action of the executive authority in refusing to surrender the prisoner.

Somewhat similar conclusions may be drawn with respect to another so-called duty of the Federal Congress, but it would seem that here there is a discretionary power, rather than a mandatory duty involved. Article XV of the Amendments to the Federal Constitution provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States *or by any State* on account of race, color, or previous condition of servitude." And the second section of the same Amendment provides: "The Congress *shall have power* to enforce this article by appropriate legislation." It has been charged from time to time that Congress has failed in a mandatory duty to enact adequate Federal legislation to prevent discriminations against the colored race, particularly in Southern States, in the exercise of the suffrage, by means of State statutes requiring ability of the voter to read and write and "explain the Constitution." While such charges make excellent campaign slogans for those who can utilize them to their own advantage, it is doubtful that, speaking from a constitutional standpoint, there is truth in such utterances. In the first place, we have here an example, not of mandatory duty, but of discretionary power, in Congress to enact "appropriate legislation" to prevent statutory discriminations on the part of the constituent States based on color alone in the exercise of the suffrage. There is plainly no mandatory duty. In the second place, if State statutes do require certain literary qualifications as conditions precedent to voting, both white and colored races are treated equally in an abstract sense, which is all that the Federal Supreme Court has thus far required.[12] And that Court has declared repugnant to the Federal Constitution certain arbitrary State statutes which could be rested for support solely on color or prior servitude, as in the so-called "grandfather" clause.[13] Conceding an effort in Congress affirmatively to enact legislation forbidding the States from requiring literary requirements in voting, it is quite possible that legislation attempting this would be declared invalid under the doctrine of the Civil Rights Cases,[14] in that the Federal Government was going beyond its ambit of power and attempting regulation of a municipal character.[15] Further conceding a mandatory duty, how could it be legally enforced? Like the powers conferred on the Federal Government by the Eighteenth Amendment, while intoxicating liquor for beverage purposes is declared illegal in manufacture, sale, and transport, there is no mandatory duty imposed on Congress to enact legislation, nor are the States so compelled; hence, there would be no constitutional objection to repeal of the Volstead Act, and where there was no legislation defining what is intoxicating liquor, or providing penalties for violation, there could be no enforcement of the Amendment.

Constitutional Omissions of Duties and Restraints

Failure to provide for certain possible action on the part of Congress or the President, raises somewhat analogous problems to those already discussed. Such omission also may occur because of too great generality of language with respect to a given function or power of government, or even the lack of precise definition of a term or word. Wide discretion is thus afforded the courts for practicing their judicial neutrality, and for consequent non-enforcement of proceedings which would seek either to compel government action or judicial construction of governmental power or areas of powers. Moreover, inability of obtaining judicial machinery in the first instance, is also present as a factor.

Various illustrations of the situation in mind are pertinent. For example, there is no limitation anywhere within the Federal Constitution on the power of the President to "pack" the Supreme Court with a numerical personnel favorable to his policies, other than the inferential power of Congress to fix the number of justices through its power to determine the Court's appellate jurisdiction, which number it has altered from time to time by statute,[16] thus restricting the President's power of appointment. Of course, there is the powerful check of the Senate in approving nominations, but where there is working control over both the Presidency and the Senate by the same political party, this is not an insurmountable obstacle. The fact that it has usually resulted disastrously for the President to play politics with the Supreme Court, does not negate the statement that, from a constitutional standpoint, there is but little restriction on the President with reference to the numerical personnel of the Supreme Court. Another *casus omissus*, in the constitutional sense, is to be found in the fact that there is no provision with respect to the number of times a President may succeed himself. Of course, there is the tradition against the third term, and Presidents have usually ob-

12. Within the meaning of Plessy v. Ferguson (1896) 163 U. S. 537.

13. Guinn v. United States, 238 U. S. 347, and Myers v. Anderson, 238 U. S. 368.

14. 109 U. S. 3 (1883).

15. Cf. the convincing argument of Senator Claude A. Swanson of Virginia, Jan. 23, 1928, Congressional Record, pp. 1931-32.

16. H. W. Horwill, "The Usages of the American Constitution," pp. 186-189.

served this usage, and it would require a strong man to violate it. But conditions might be such that it would be attempted; if so, there would be nothing, so far as the written Constitution is concerned, to hinder. Moreover, there is no precise definition in the Constitution as to when a President or Vice-President has reached that condition of "inability" to justify his removal from office. Congress is given the power to regulate the succession in case of "inability" on the part of the President or Vice-President to perform his official duties. By statute, Congress has laid down some rules as to succession, but has not defined "inability."[17] Does the fact that the President is physically incapacitated for six months bring into operation a state of "inability?" And who, or what body of men, if any, is to initiate the first steps in the determination of so-called inability? In other words, where is the legal machinery? Moreover, the President, by Article II, section 3, "shall from time to time give to the Congress information of the state of the Union." By what legal machinery could he be compelled to discharge this mandatory duty? The answer must be plain, that there is none. Only his high sense of his own judicial and executive duties is the impelling sanction.

There are no provisions in the written Federal framework of government for withdrawing amendments by the constituent States, after they are once made a part of the Constitution. There are no provisions concerning whether or not, prior to ratification by the necessary three-fourths of the legislatures or States in conventions, an amendment declared to be ratified by a State, may be withdrawn.[18] The Constitution being silent on these matters, must raise doubts as to the existence of such power in the judiciary, in the legal machinery, to assume to interfere in these relationships.

Trespassing by Co-Equal Powers of Government

There may be duties impliedly imposed not to interfere with the activities of co-equal branches in government, but quite often these duties are breached and trespasses, so-called, occur, but nothing legally can be done about them. Thus, by a Resolution of the Senate, of February 11, 1924, by a vote of 47 to 34, the President was called upon "immediately to request" the resignation of the Secretary of the Navy[19] because of the so-called oil frauds. In the debates on the Jay Treaty, in the House in 1796, a resolution of the House of Representatives was directed to the President to submit certain documents relating to the negotiation of the treaty, on the ground that since appropriations were to be voted, the lower House had an indirect power in the negotiation of treaties. On President Washington's refusal to submit the documents, the House voted the appropriations only by a close vote, but fortified itself by another resolution that it reserved to itself always the right to carry out a treaty which involved the outlay of moneys, by refusing to vote appropriations.[20] In more recent times, when certain employes of the Federal Power Commission were discharged by newly appointed Commissioners, the Senate, by another close vote, moved to reconsider its approval to the nomination of the Commissioners, thus involving conflict with the Executive power of appointment. Other illustrations, particularly in Senate action, might be cited confirmative of the view that trespasses occur by one department of government into the domain of another, where judicial enforcement or arbitration is not possible. Perhaps in the case of the Senate's claim to reconsider its approval, legal proceedings in *quo warranto* might lie to contest the right of the incumbents to hold office, on the ground the Senate did have power to reconsider its vote of approval. On this matter, there is at present but little constitutional authority. But the instance will probably be a rarity where legal machinery can be called upon, in cases of this character.

Discretionary Powers Not Legally Enforcible

Much discussion is prevalent regarding the duty or power of Congress in the manner of submission of amendments to the constituent States. There is a contention by some, relating particularly to the Eighteenth Amendment, that where an amendment transfers affirmative power from the realm of reserved power of the States to the Central Government, the duty is imposed on Congress, under the 5th Article, to submit the proposed amendment to conventions in the various States.[21] The notion is that conventions expressly so called could, with greater propriety, interpret and more effectively represent the will of the people in passing upon a proposed amendment which radically affects the structure of government; that this is not the case where an amendment proposes only to empower the Federal Government to place negative restrictions on State action. Without anticipating the decision of the Federal Supreme Court in the ruling of Judge Clarke to this effect, it must be urged against this position that in Congress, by express provision, the Constitution imposes a discretionary power to submit all amendments, of whatever kind, either to State legislatures or to conventions in the States, and that this should be an end of the controversy. There is no mandatory duty of whatever kind imposed as to the manner of submitting amendments; by the Constitution, Congress alone is given the discretion to decide which method shall be followed.

Another problem, also arising from the Eighteenth Amendment, is that concerning the nature of the duty Congress is under to enact legislation under the Amendment. After providing for the outlaw of intoxicating liquor for beverage purposes, in its sale, manufacture, and transportation, the Amendment provides that the Congress and the several States shall have concurrent power to enforce the same. There is no provision making it mandatory on the Congress or the States to enact any legislation whatever, and a repeal of the legislation would make it impossible to enforce the Amendment.[22] Nothing could be done in an affirmative way to compel Congress to enact legislation under the Amendment, conceding it to be mandatory in duty; nor could anything be done to restrain Congress from repealing the Volstead Act. These are purely powers of legislation, not cognizable by

17. Acts of January 19, 1886. 24 Stat. 1, c. 4.
18. Orfield, "The Procedure of the Federal Amending Power," 25 Illinois Law Review, 418.
19. Horwill, supra, note 16, p. 146.
20. Ivan M. Stone, "The House and the Treaty-Making Power," 17 Kentucky Law Journal, 216, pp. 223-227.
21. William L. Marbury, "The Limitations Upon the Amending Power," 33 Harvard Law Review, 223. Cf. Elihu Root, arguendo, in National Prohibition Cases, 253 U. S. 350, at p. 367.
22. James M. Beck, Speech in the House of Representatives, February 7, 1930.

legal machinery, for the latter has no power to act in *thesi*. But the real objection is from the standpoint of the nature of the power in Congress; it is a discretionary one, not a mandatory duty. A pronounced change in the sentiment of the electorate might raise the issues rather suddenly.

A Proposed Remedy for Legal Enforcement

From whatever standpoint regarded—whether a mandatory duty, a discretionary power, or an implied power not to trespass—the legal machinery is, under present arrangements, entirely inadequate to enter these domains of government in the United States. It may be best that it cannot project itself into these controversial realms, that it is beyond the judicial function to do so. At least, that is the direction that these governmental institutions have taken. On the other hand, it may be questioned whether or not a better method could be provided. Under the new German Constitution, the Federal Supreme Court may render advisory opinions, which have the binding force of law, where problems of conflict of jurisdiction between Central and State Governments arise.[23] A similar provision might be worked out in the United States. No amendment would be necessary, for Congress may confer purely advisory or declaratory functions on legislative courts, or probably on administrative tribunals created by it. It has done so in the Court of Claims and in certain of the District of Columbia Courts.[24] It has also been proposed, by a bill in Congress, to empower some Federal administrative tribunal to render advisory opinions on the vexatious problem when a given combination is in restraint of interstate trade, thus binding executive action and protecting the interests of those affected by present uncertain anti-trust legislation. A similar arrangement is worth investigating relating to the various types of duties resting on Congress, as well as those "trespasses" that occur from time to time. An amendment would, of course, be necessary if the plan were to empower the Supreme Court of the United States to render such opinions, where no case or controversy were feasible. Its prestige and highmindedness would probably make for greater respect and obedience if there were also an express provision made for enforcement. Otherwise, the problem of enforcement of constitutional duties would still remain unsolved.

23. Simons, "Relation of the German Judiciary to the Executive and Legislative Branches," 54 American Bar Association Reports, 226.

24. Keller v. Potomac Electric Power Co. (1923), 261 U. S. 428. Cf. Katz, "Legislative Courts," 43 Harvard Law Review, 894.

DEPARTMENT OF CURRENT LEGISLATION

Federal Legislation of 1930—Continued

BY MIDDLETON BEAMAN, CHARLES F. BOOTS, ALFRED K. CHERRY, ALLAN H. PERLEY, HENRY G. WOOD, JOHN O'BRIEN, EUGENE J. ACKERSON AND THOMAS R. MULROY

Courts

PUBLIC 287 amends section 649 of the Revised Statutes [U. S. C., title 28, § 773] to permit parties in a civil case in the district courts to waive a jury trial by an oral stipulation made in open court and entered in the record, and provides that the finding of facts by the court when such oral stipulation is made, as in the case of a written stipulation, shall have the same effect as the verdict of a jury. Hitherto it has been held that a finding of the court after an oral waiver of jury trial, could not be considered on appeal for any purpose, and the record was treated as if it were a general finding, with no review of any alleged errors as to admission of evidence, burden of proof, or sufficiency of evidence. (Commissioners of Road Improvement District v. St. Louis Southwestern R. Co., 257 U. S. 547, 562.) Section 700 of the Revised Statutes (U. S. C., Title 28, § 875) is construed to apply to, and to permit a full review of, all questions of law only when a written stipulation of waiver is filed. In the absence of such written waiver only the primary record of process, pleading, and judgment is reviewable, because the findings of the judges are not judicial in character, but are similar to findings in an arbitration or submission upon an agreed statement of facts. (Law v United States, 266 U. S. 494.) The amendment removes this limitation on the review of civil cases tried by the court without a jury.

Reserve officers, particularly those who are engaged in the practice of law, have been subject to the provisions of those statutes placing upon officers of the United States disabilities such as that of not being permitted to practice before executive departments of the United States. Public 490 removes such disabilities by providing that reserve officers while not on active duty shall not, solely by reason of their status as reserve officers, be held officers or employees of the United States, or persons holding any office of trust or profit under the United States, or exercising any official function.

Public 413 amends section 2 of the Act of February 24, 1925, as amended by section 711 of

the Revenue Act of 1928, to authorize the chief justice or any judge of the Court of Claims to take evidence in any place in the United States in any case instituted in the court, and to increase the traveling and subsistence allowance limit from $7 to $10 a day for commissioners and judges so taking evidence. Sections 3 of the Act of February 24, 1925, which limited the life of the Act to three years, and the Act of January 11, 1928, extending its life to January 11, 1931, are repealed, making the office of commissioners permanent. The use of commissioners instead of authorizing additional judges as a relief for congestion of the docket was stated by the House Judiciary Committee report on the bill to be successful, but the committee believed that to authorize the judges to take evidence as commissioners would enable the court to promptly dispose of cases involving not only intricate issues of fact, but of law, and especially those cases involving tax refunds and contracts calling for interest, where interest accruals rapidly mount into large figures.

The Act of 1927 directing the Librarian of Congress to revise and publish the index to the Federal statutes published in 1908, including the Acts of the 69th Congress, is amended by Public 356 to include the Acts of the 70th Congress, and the authorization for the work is increased from $25,000 to $50,000, thus making it possible to start the work as soon as the necessary appropriation is made, previous authorizations having been found insufficient to warrant the beginning of any work.

The United States Supreme Court Building Commission is empowered by Public 26 to proceed with the construction of a new building for the exclusive use of the Supreme Court. The law stipulates that the structure shall be built substantially in accordance with plans submitted to Congress in the report of the commission (71st Congress, 2d Session, House Report 34). According to these plans, a large fireproof building will be erected which will contain, in addition to rooms for the justices and a chamber for the court, ample library facilities, offices for the Attorney General and the Solicitor General, and rooms for consultations of attorneys practicing before the court. An appropriation of $9,740,000 is authorized.

Taxation and Finance

One of the earliest decisions taken at the session was incorporated in Public Resolution 23, which reduced rates of income tax applicable to the calendar year 1929, but it should be remembered that in the absence of further action by Congress the rates imposed by the Revenue Act of 1928 will again be applicable to the calendar year 1930 and subsequent years.

Public 376 provides further exemption from taxation in the case of Treasury bills, which are issued on a discount basis and payable at maturity without interest. The amount of discount by previous legislation was considered to be interest and exempt from taxation (except estate and inheritance taxes) by the United States, any State, or any possession of the United States, or any local taxing authority. The new Act grants a similar exemption to any gain from the sale or other disposition of Treasury bills issued after June 17, 1930, and further provides that no loss from the sale or other disposition of such bills shall be allowed as a deduction or otherwise recognized for the purposes of any tax imposed by the United States or any of its possessions. It will be noted that the exemption of gain from taxation extends to State taxation, but that the prohibition of deduction of a loss is confined to taxes imposed by Federal authority.

Much of the bank legislation is caused by the need of organizing the banking system on a federal basis. Public 431 clears up the doubt as to what kind of security a National bank may give as the depositary of funds of a State or of a political subdivision thereof by providing that with respect to such deposits a National bank may give such security as is authorized by State law applying to other banking institutions in the State. Public 134 amends section 9 of the Federal Reserve Act by authorizing the Federal Reserve Board, in its discretion and subject to such conditions as it may prescribe, (1) to waive the provisions requiring a State bank or trust company to give the board six months' written notice of intention to withdraw from membership in the Federal Reserve System and (2) to permit any such State bank or trust company to withdraw from membership prior to the expiration of six months from the date of such written notice of intention. Public 435 amends section 11 of the Federal Reserve Act so as to enable National banks to surrender voluntarily the right to exercise trust powers in order to relieve them of the necessity of complying with the provisions of law governing banks exercising such powers and to permit them to obtain a return of securities deposited with the State authorities for the protection of private or court trusts. In order to expedite the settlement of the affairs of failed National banks, Public 55 authorizes the receiver of a National bank, with the approval of the Comptroller of the Currency and upon the order of a court of record of competent jurisdiction, to compromise, either before or after judgment, the individual liability of any shareholder of the bank. Public 120 amends section 13 of the Federal Reserve Act so as to permit member banks of the Federal Reserve System to rediscount with the Federal reserve banks as much paper of a single borrower as a National bank is permitted to acquire from a single borrower under the provisions of section 5200 of the Revised Statutes.

United States and the States

Adjustment of acts of Congress to suit our federal system are not separately noted, but there are two types of relations between the United States and the states which must be set apart, compacts and Federal aid. An example of each appears in the laws of 1930. Public 370 gives the consent of Congress to a compact entered into by Colorado, New Mexico, and Texas in 1929 relating to the use of the waters of the Rio Grande River. The compact establishes a moratorium until June 1, 1935, before which time it is hoped that the three States will work out their problems and reach a final agreement, subject to approval by Congress. The compact expresses the conviction of the three States that without cost to them the United States should construct projects for the drainage of the

so-called Closed Basin of the San Luis Valley, but stipulates that approval by Congress of the present compact shall not be construed as an acceptance of this view on the part of Congress.

Public 317 amends the Vocational Rehabilitation Act of June 2, 1920, as amended, by extending for a period of three years the appropriation of $1,000,000 a year, to be made available to the States for promotion of vocational rehabilitation of persons disabled in industry or otherwise, and their placement in employment. The minimum allotment to each State is increased from $5,000 to $10,000 for each fiscal year, and the appropriation for the administrative expenses available to the Federal Board for Vocational Education is increased from $75,000 to $80,000 a year.

Miscellaneous

Public 164 amends paragraph (11) of section 20 of the Interstate Commerce Act, which relates to carriers limiting, by contract or otherwise, their liability for loss, damage, or injury to property transported. Heretofore, in the case of a claim being filed on account of any such loss, damage, or injury, that paragraph has provided that the carrier could not fix a shorter period than four months for filing claim, or a shorter period than 90 days for giving notice that the claim was to be filed. By virtue of changes made by this amendatory Act, the carrier now may not fix a period of less than nine months for filing of the claim; and the prohibition on limiting the time for notice of claim is stricken out, the committee report stating that carriers do not require such notices. The amendatory Act also repeals a proviso to the effect that no notice of claim, and no filing of claim, should be required as a condition precedent to recovery, in any case where the loss, damage, or injury was due to carelessness or negligence while the property was in transit or was being loaded or unloaded, or was due to unreasonable delay in transit or in loading or unloading. The repealed proviso also provided that in such cases no suit could be instituted after three years from the time the cause of action accrued. The effect of the repeal of the proviso is to subject such cases to the same requirements as to filing of claim and bringing of suits as other loss and damage claims.

Public 522 amends the World War Veterans' Act, 1924, as amended. Many changes in existing law were effected by this Act, including the three following significant amendments to section 19, the section under which suits may be brought on insurance contracts in the event of disagreement as to claim:

(1) The time in which suits based on yearly renewable term insurance may be instituted has been extended one year from the date of the approval of the amendatory Act, that is, until July 2, 1931. This extension, however, does not apply to suits based on United States Government life (converted) insurance.

(2) Witnesses who are required to attend trials but who live at a greater distance than 100 miles from the district court wherein the case is to be tried, may now be subpoenaed. This new provision makes unnecessary a continuance of the present unsatisfactory practice of securing the testimony of such witnesses by depositions.

(3) The terms "claim" and "disagreement" are defined for the first time in this amendment to section 19. The practical effect of the inclusion of these definitions is to require claimants to make claim for insurance and prosecute their cases on appeal through the appellate agencies of the bureau before they shall have the right to enter suit. Therefore, it is no longer possible for a veteran to elect to go immediately into court without any prior adjudication of his claim by the bureau.

To afford agriculture, so far as practicable, the same opportunity to participate in the benefits of the patent system as has been given industry, Public 245 provides that any person who has asexually reproduced any distinct and new variety of plant, other than a tuber-propagated plant, may obtain a patent therefor upon a showing of facts similar to that necessary for the obtaining of patents for industrial inventions. The patentee is thereby granted the exclusive right to propagate such a plant by asexual reproduction, but not by seeds.

Three laws of the second session of the 71st Congress evidence a spirit of commemoration of George Washington, stimulated, perhaps, by the approaching bicentennial of his birth.

The publications program of the George Washington Bicentennial Commission is approved by Public 53. The commission is authorized to prepare and publish a definitive edition of all Washington's "essential" writings (except the diaries). The plan calls for a book of about 25 volumes, of which 3,000 sets are to be printed, 2,000 being for sale to the public. The publication of educational pamphlets about the life and work of Washington is authorized, as are a map of the places he visited and inhabited, and a photolithographic portrait of him.

Public 34 authorizes an appropriation for the purpose of improving the property of the United States at Wakefield, Virginia, the birthplace of Washington. The law contemplates the removal of the present monument to another site, the erection of new buildings on the premsies, and beautification of the grounds. The property of the United States at Wakefield is made a National monument under the administration of the National Park Service.

Public 284 is a law looking to the construction of a great National park in the vicinity of Washington, D. C. By its terms moneys are appropriated for the development of a George Washington Memorial Parkway from Mt. Vernon to Great Falls on the Virginia side of the Potomac River, and from Fort Washington to Great Falls on the Maryland side of the river. Provision is made for the acquisition of land, construction of roads, and preservation of the scenery of the places. The law also provides for the extension of the present Rock Creek Park and Anacostia Park systems in the District of Columbia. Provision is made for the contribution by Maryland and Virginia to the cost of the projects and for recapture of a contemplated bridge over Great Falls.

The general interest which the measure will arouse justifies inclusion of Public Resolutions 98. Its passage resulted from pressure for adequate measures for providing for conscription of private

property in time of war. Congress creates a commission to "study and consider amending the Constitution of the United States to provide that private property may be taken by Congress for public use during war and methods of equalizing the burdens and to remove the profits of war, together with a study of policies to be pursued in event of war." The commission shall make definite recommendations not later than December, 1931, and to report if any constitutional amendment is necessary. The commission is prohibited from considering or reporting upon the conscription of labor. The commission is to be composed of four members of the House to be appointed by the Speaker, four members of the Senate to be appointed by the President of the Senate, the Secretaries of War, Navy, Agriculture, Commerce, and Labor, and the Attorney General.

INTERVENTION IN FEDERAL EQUITY CASES

Generally Hostile Attitude Toward Intervention and Possible Explanation Thereof—Mistake of Confusing Petition for Leave to File Intervening Petition and Intervening Petition Itself—Federal Equity Rule 37 Is Chief Guide in Drafting Both Petitions—Points Especially to Be Considered in Connection With This Rule and Also Rule 27

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FEW fields of jurisprudence are less understood or are the source of more conflict and confusion than that of intervention. It has grown up almost without legitimate parentage or sponsorship within the last few decades in both law and equity and in both state and federal practice, in some jurisdictions being governed by statutes and in others by rules of Court or precedents. Obviously it is impracticable in a single article to discuss this entire field. While it is still largely true, as in 1897, that, "The law and practice upon these subjects . . . have not received the attention they deserve from either the digesters or text-writers,"[1] yet reference may be had to more recent sources for an analysis of the general subject,[2] and this discussion will be limited to certain practical phases of interventions in federal equity cases.

One of the most striking features to be found in actual practice is the animosity evinced by the parties. This perhaps is not to be unexpected since an intervention is an attempt by a stranger to a pending litigation to have the Court adjudicate and prefer his rights, claims, liens or charges over those of present parties. The latter feel that their integrity is attacked and look upon the intervention as a blackmailing scheme, since the intervener's interest is usually minor. They often designate the attempt as striker litigation or by other unsavory epithet designed to convey the meaning that the intervener and his solicitor are engaged in a low, nefarious undertaking. Whereas the intervener is usually convinced that they are conspiring under cloak of a technicality to divide up the proceeds and leave him nothing.

Perhaps one reason for this distrust is the manner in which interventions are sometimes instigated by a few security holders. In the case of interventions in railroad receiverships, for example, the securities are widely held. Perhaps only a few holders are aware of what is going on, and they have only a very small part of the securities. They may deem it desirable to intervene in order to protect the interests of the holders of the class of securities held by them, yet they realize that the cost of the litigation will be out of proportion to the benefits they themselves will derive from it, and, since it will benefit all holders of securities in that class, they feel all should unite in the intervention and share its costs. Furthermore, it may become necessary, in order to protect the interests of this class of security holders, to propose a plan of reorganization in which all the holders will be required to pay an assessment in order to preserve their interest, and this can only be done if a substantial portion of the securities are actually represented in Court.

Under these circumstances it is the usual practice to form a protective committee from among the security holders. This committee then enters into a deposit agreement with one or more banks or trust companies for the benefit of depositing security holders. This agreement sets out the rights and obligations of the parties and provides a method of sharing the cost of the litigation. The committee then, in the case of stockholders, circularizes the entire list, giving a resumé of the situation (always a gloomy one) and requests them to deposit their securities under the terms of the agreement. In the case of bond and note holders the problem is more difficult, as there is seldom available a list of holders. They must usually be reached by advertising in newspapers.

When the protective committee deems a sufficient percentage of the securities has been deposited to warrant it in going ahead, it, through counsel, proceeds to draft a petition for leave to intervene. This is the first hurdle, and often the most difficult

1. 31 American Law Review, p. 392.
2. 20 Ruling Case Law (P. S. Ed.) p. 682. Hopkins Federal Equity Rules (6th Ed.) pps. 184, 291. Tracy Corporate Foreclosures p. 48. Note in 123 A. S. R. 291. Reference may be had also to the above sources for additional annotations.

one. The petition must set out facts justifying the intervention which usually include the history of the case, the interest petitioners have or claim in the subject matter of the suit, and the reasons for the intervention. The only prayer is for leave to intervene. The Court will allow such a petition to be filed and will grant or deny the prayer.

In this connection the mistake is often made of confusing the petition for leave to file an intervening petition and the intervening petition itself, i. e., the petition for leave to file may contain a prayer for other relief also, thus becoming an intervening petition. If it is desired to have the intervening petition in Court at the time leave to file it is asked, it is proper to draft a shorter petition merely asking leave to file the intervening petition and referring to it as an exhibit. If this is done and leave to file is denied, the shorter petition for leave to intervene will be filed and the Court will sign a certificate of evidence containing the intervening petition. It will in this manner become a part of the record for the reviewing Court.

The chief guide in drafting both petitions is Rule 37[3] of the Federal Equity Rules. Two points should be noted as to this rule: first, the discretionary power of the Court, and second, the requirement that the intervention be in subordination to and in recognition of the propriety of the main proceeding. Let us consider these in turn.

The language of the rule is that intervention ". . . may . . . be permitted . . ." This appears to give the Court complete discretion. However, paradoxical though it may seem, the fact is that the word "may" is sometimes construed to mean "must." In other words, there are two classes of intervention: one which is discretionary with the Court, and the other in which the right to intervene is absolute.[4]

The cases in which the right to intervene is absolute, appear to have two characteristics in common: first, the intervener has no other remedy except by intervention and the decree of Court will be *res judicata* as to his claim and, second, he has no adequate representation in Court. It is thus apparent the dividing line is fixed at a point which will give him an opportunity to be heard either in the main proceeding, in person or by representative, or in an individual suit.

The first characteristic, i. e., no other remedy, is illustrated by the case of a receiver in which a fund is about to be distributed by the Court, and if the intervener is not permitted to intervene, his rights in the fund will be gone forever. On the other hand, if he can maintain an independent suit which will not be affected by the decree in the main proceeding, his rights will not be cut off and he has no absolute right to intervene.

The second characteristic, i. e., no adequate representation, may be divided, like all Gaul, into three parts: (a) no representative,[5] (b) representative also represents adverse interest,[6] and (c) intervener has already been recognized either tacitly or expressly as a party to the suit.[7]

Under this classification, (a) is illustrated by the case of a receivership in which the chief assets are subject to a mortgage held by the intervener and no one is in Court representing him. Naturally, since he has a paramount right to be paid out of the assets covered by his mortgage, he should be permitted to intervene. It would also seem that he should be allowed to intervene, although he has a representative, where the representative fails to take action necessary to protect his interests. An illustration of this is a receivership in which the attorney for the company purports to represent the stockholders, but in fact, refuses to take any action.

An illustration of (b) is a case in which there are two bond issues having conflicting priorities involved in a receivership and both issues are represented by the same trustee. The owners of one of the bond issues should be permitted to intervene.

An illustration of (c) is a case in which the stockholders in a receivership have been permitted to sit in on hearings and take part in the proceeding, although not actually a party. This would appear to be a recognition that they are not being adequately represented by the attorney for the company and are therefore entitled to intervene.

The second requirement of Rule 37 as above set forth, is that the intervention be in subordination to and in recognition of the propriety of the main proceeding. This has been construed to mean that at whatever stage it is sought to intervene, the intervener is bound by all that has gone before. Thus, if a decree has already been entered into, and the term of Court has passed, the intervener will not be permitted to attempt to vary its terms.[8]

An interesting question is raised, however, when, as often happens, the Court extends the term for the purpose of enabling a sale to be made within the term and reserves jurisdiction of claims presented within that period. It would seem that interveners within the term so fixed should be permitted to object to the enforcement of the decree and seek to modify it.

However, where the decree has been affirmed by the Circuit Court of Appeals, this necessarily closes the door in the District Court to all attacks on the proceeding so affirmed. The procedure under such conditions, it seems, is to petition the Circuit Court of Appeals for leave to file a pleading in the District Court for a review of the decree.

However, if the intervention is in apt time, the intervener has the right to seek action by the Court contrary to that sought by other parties. This is the whole gist of and reason for the intervention. It thus behooves the intervener to file his petition as soon as possible after the suit is commenced in order that the argument of *res judicata* and *laches* may not be raised against him.

In connection with Rule 37, Rule 27[9] of the Federal Equity rules must also be considered. As to this rule the chief points to be considered are:

3. " • • • • Anyone claiming an interest in the litigation may at any time be permitted to assert his rights by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."

4. Credit Commutations Co. vs. United States, 177 U. S. 311. United States vs. Phillips, 107 Fed. 824. Minot vs. Masters 95 Fed. 734.

5. Minot vs. Masters Supra. Western Union Telegraph Co. vs. U. S. Mexican Trust Co., 221 Fed. 545. Richfield Oil Co. vs. Sawtele, 279 Fed. 851. Vicksburg S. N. P. Ry. Co. vs. Schaff, 5 Fed. (2nd) 610.

6. Farmers' Loan & Trust Co. vs. Northern Pacific R. R. Co., 66 Fed. 169. Farmers' Loan & Trust Co. vs. Cape Fear, etc., 71 Fed. 88. Central Trust Co. vs. C. R. I. & P. Ry. Co., 218 Fed. 336. In Re Babcock, 26 Fed. (2nd) 153.

7. Bronson vs. LaCrosse R. R. Co., 2 Wall. 283. Hamlin vs. Toledo, etc. R. R. Co., 78 Fed. 664. U. S. Trust Co. vs. Chicago Terminal Co., 188 Fed. 292.

8. Palmer vs. Bankers Trust Co., 12 Fed. (2nd) 747. Swift vs. Black Panther Oil and Gas Co., 244 Fed. 20. Commercial Electric Supply Co. vs. Curtis, 269 Fed. 657. King vs. Barr, 269 Fed. 56 Larson vs. Wrigley, 275 Fed. 526.

9. "Stockholder's Bill. Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation,

first, it is designated "Stockholder's Bill"; second, it requires an allegation that the plaintiff was a shareholder at the time of the transaction complained of or that his share has devolved upon him since by operation of law; and third, it requires to be set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the cause of his failure to obtain such action, or the reasons for not making such effort.

It would seem from its title, namely, "Stockholder's Bill" that this rule has no application to interventions. Certainly it can effect only interventions by stockholders. However, in a few instances Courts have required it to be complied with by intervening stockholders.[10]

The requirement that the intervener hold his stock at the time of the transaction complained of seems quite harsh. This is abviously aimed at suits brought by stockholders who acquire their stock for the sole purpose of the action, thus smacking of holdup or blackmail. This may be a wise provision in preventing corporations from being harassed and embarrassed by independent suits brought by an individual stockholder, but where the corporation is already a party to a pending litigation and perhaps in receivership, it would appear that one party more or less can make little difference to it. It may be the best time for the family skeleton to be paraded. Perhaps a small clique has been in control of the company and has been milking it for years and because of this control the company could not take action against him. Under such conditions would it not seem more equitable for the Court to favor a stockholder who bought his stock without notice of these nefarious dealings although after the occurrence complained of rather than the guilty officers and directors? Rather than force strict compliance with Rule *27*, would not a more equitable guide be our old friend laches? If it is evident to the Court that the wrongs complained of have been common knowledge for some time so that the intervening stockholder either knew or should have known of them at the time he purchased his stock, or if he has waited an undue time since he purchased the stock without taking action, the intervention may be denied on that ground. On the other hand, if the wrong has been kept a close secret so that knowledge can not be imputed to the intervener and he alleges under oath that the matter has just come to his attention, would it not seem more equitable to ignore the strict requirement of this rule in the case of interventions?

The second requirement, namely, that an effort be made to persuade the directors to take the desired action or an explanation be given of why this was not done, is not so harsh as the above requirement and fits into the scheme of absolute intervention. One reason causing the right to intervene to be absolute is that the intervener has no representative in Court. The attorney for the company is supposed theoretically to represent the stockholders, and if he is actually doing so, there is no need for intervention. But if he fails or refuses to take the action necessary to protect the stockholders' interests, especially after being urged to do so by the stockholders, they have no adequate representation and so are entitled to intervene. It is thus no hardship to require the intervener to set forth what steps he has taken to obtain the desired action through the attorney for the company or give his reasons for not doing so. However, this showing may be required without the aid of Rule *27* on the broader ground that the burden is on the intervener to show that he is not already adequately represented.

It should be noted that intervention need not comply with the requirements for independent suits in respects other than those contained in Rule *27*. Thus they may involve a lesser sum than the jurisdictional amount and do not require diversity of citizenship. This is in conflict with the spirit of that provision of Rule *27* which forbids collusion in order to gain Federal jurisdiction. The Court will, as an incident of its original jurisdiction, hear all questions involved in the disposition of the subject matter.

If the Court permits the intervention to be filed, an appeal may be had as a matter of course, but if leave to file is denied, a different situation is presented. The first thought of the intervener is to appeal. He feels that the District Court has done him a great injury which will be apparent to the Circuit Court of Appeals, and he only needs to carry the case to that Court in order to obtain a swift reversal. It will perhaps not occur to him that there should be any difficulty in perfecting his appeal. But to his surprise he will find the parties who are already in the case again solidly lined up against him when he presents his appeal petition.

The reason for this opposition is that the right to an appeal is divided in the same way as the right to intervene: discretionary and absolute, and for the same reasons. If the right to intervene is absolute, the right to an appeal is also; if it is discretionary, there is no right of appeal. The only difference is that it is often difficult for the District Court to determine whether the right to intervene is absolute or only discretionary. For this reason, it would seem appeals should be allowed except in clear cases.[11] The reviewing Courts can then determine whether there is an absolute right to intervene.

If the petition for an appeal is denied by the District Judge, the intervener may petition any judge of the Circuit Court of Appeals to grant the appeal. Or he may file a petition for *mandamus*[12] in the Circuit Court of Appeals to compel the District Judge to file the intervening petition. The latter is an extraordinary remedy and raises the entire question of the right to intervene.

It is hoped this fragmentary discussion will suggest to the uninitiated the many difficulties confronting the intervener and perhaps will provide a starting point from which to attack his particular problem.

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must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action, or the reasons for not making such effort."

10. Harris Trust Co. vs. Chicago Railway Co., 23 Fed. (2nd) 193. In re Babcock, 26 Fed. (2nd) 158. Continental and Commercial Trust & Savings Bank vs. Allis-Chalmers Co., 200 Fed. 600.

11. U. S. vs. Phillips, supra.

12. In re Babcock, supra.

ZONING: AN ANALYSIS OF ITS PURPOSES AND ITS LEGAL SANCTIONS

Present Status of Zoning and City Planning Law—Sanctions Usually Pronounced as Justifying Zoning—Real Considerations Prompting Enactment of Such Ordinances—Recognition of Economic Aspect of Zoning Need Not Affect Constitutionality—Importance of Judicial Recognition of Real Basis

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"Legislation cannot be judged by theoretical standards. It must be tested by the concrete conditions which induced it . . ." Mr. Justice McKenna in Mutual Loan Co. v. Martell, 222 U. S. 225; 32 Sup. Ct. Rep. 74, 56 L. Ed. 175

FICTION has often been the peacemaker in battles between logic and necessity in the history of the common law. Employment of a fiction of one sort or another has often facilitated the acceptance of some new doctrine without the abandonment of precious legal logic. In time the fiction has become meaningless, and the new rule accepted on its own merit.

The use of fictions has not been so pronounced in the field of constitutional law. We seem, however, to find the courts indulging in something close to fiction, in recognizing extensions of the states' power to regulate the use of private property.

In recent years the constitutionality of stringent zoning ordinances has been sustained repeatedly on grounds that bear but little genuine relation to, or are but incidental to, the real purpose of such ordinances. Zoning ordinances have been paraded under the guise of measures designed to effect purposes usually unthought of by the city councils enacting them. In this way, what is really a very radical though necessary extension of the states' police power has become established. In this growing field of zoning and city planning any tendency to call black white, or even gray, as a means of sanctioning broader powers, only leads to confusion and uncertainty, however much it may preserve the symmetry of our constitutional law.

Present Status of Zoning and City Planning Law

About twenty years ago American cities first began to adopt zoning ordinances, and to lay comprehensive plans for their physical development. For a time the courts consistently held zoning ordinances unconstitutional as unduly infringing upon rights in private property.[1] Cities, however, went blithely on, passing even broader and more far-reaching ordinances.

Zoning regulations, in certain aspects at least, are now no longer regarded as unconstitutional. A law preventing a person from constructing a store building[2] or even a four-family flat in a more or less arbitrarily defined district, no longer does violence to rights guaranteed by the 14th Amendment.[3] An ordinance preventing a person from so constructing his house that any portion of it will extend to within a certain distance from the front line of his property does not deprive him of his property without due process of law.[4]

Uncertainty, however, shrouds the legality of other aspects of zoning, discussed hereafter. If the reasoning of the cases is accepted, one would be bold indeed to attempt to define its scope, or to suggest its limitations. The legal sanctions of zoning deserves careful analysis and clear statement. If these are properly formulated it will be easier to determine not only the extent of the zoning power but also the validity of legislation designed to require private development to conform to other phases of the "City Plan," such as a major highway plan, and of legislation controlling outdoor advertising. The courts will shortly be called upon to pass upon much legislation of this character, and some common criterion should be found, if possible, by which its specific applications may be tested.

Sanctions Usually Pronounced as Justifying Zoning

The sanctions most commonly pronounced as justifying zoning regulations scarcely reflect the economic and social considerations prompting their enactment. It is highly important for clarity in the law, for the progress of the city planning movement, and for a proper determination of where public rights end and private rights begin, that the legality of zoning and planning legislation rest on solid foundations. A variance between the fundamental objectives of this sort of legislation and ostensible aims put forth to satisfy the courts (and solemnly recited by them in rendering their decisions) can only lead to confusion and uncertainty.

Lengthy disquisitions on public health, public safety and public morals have largely dominated judicial discussions in this field. The courts, very properly, as a rule, do not inquire as to just how the public health, safety or morals are protected, but are satisfied with a finding that general, though perhaps indefinite, considerations of that character

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1. State ex rel Lachtman v. Houghton, 134 Minn. 226; 158 N. W. 1017, L. R. A. 1917, F. 1050.

2. Zahn v. Board of Public Works, 195 Cal. 497, 234 P. 388, 274 U. S. 325, 47 Sup. Ct. Rep. 594.

3. State ex rel Beery v. Houghton, 164 Minn. 146, 204 N. W. 569, 273 U. S. 671.

4. Goreib v. Fox, 145 Va. 554, 134 S. E. 914, 274 U. S. 603, 47 Sup. Ct. Rep. 675.

moved the legislative bodies. Now legislation seldom has its origin in general or indefinite considerations of that or any other character. It is prompted as a rule by very definite considerations, usually economic. This sort of legislation is no exception to the rule.

The difficulty is that the courts have attempted to sustain zoning by bringing it within judicial utterances supposed to define the limits of the police power. The phrase, "public health, safety, morals and general welfare" has, apparently by much usage, acquired a certain sanctity. And as applied to this sort of legislation, an undue emphasis has been placed upon the first three words.

For example, we are told that a city may prohibit the erection of billboards in a certain district because such prohibition would protect the public morals, in that billboards may serve as shields for immoral practices. And a provision in the ordinance that such "shields" might be erected nevertheless, if a majority of the owners in the vicinity consented thereto, was valid, and this even though all the owners might live in Timbuctoo.[5]

And grocery stores may be prohibited from a given area in that, among other things, the city would thereby be able to give better police protection. Perhaps there is some remote connection between grocery stores and police protection but certainly not such as to warrant depriving a man of an otherwise lawful use of his property. In all fairness to the city council, probably such a consideration was farthest from their minds. Probably the suggestion made by the court "that property brings a better price in residence neighborhoods where business establishments are excluded" was a major consideration.[6]

An ordinance prohibiting apartment houses in certain areas was sustained in a leading case[7] because "it tended to promote and perpetuate the American home," the court saying:

". . . . we think it may safely and sensibly be said that justification of residential zoning may in the last analysis be rested upon the civic and social values of the American home."

Now, of course, the ordinance made no pretense of preventing, or even discouraging people from living in apartment houses. In fact it provided apartment house areas sufficient for literally millions of people. Such reasoning, while perhaps sufficient to sustain the particular aspect of the ordinance before the court, hardly assists in finding a sound legal basis for the ordinance as a whole, which was equally solicitous in protecting apartment house districts, commercial districts, and certain types of industrial districts.

An ordinance requiring all buildings on a certain street to be "set back" at least thirty feet from the street line was sustained. The court says the city council might have concluded that "the public welfare would have been subserved, danger from fires lessened, danger from street traffic lessened." It would seem that if the fire danger were a controlling consideration, the setback would bear some relation to the width of the street, and would be equally applicable to other districts. The "danger from street traffic" was palpably no consideration at all. True the city councilmen may have come to the conclusions the court puts into their heads. One may venture the guess, however, that the conclusions upon which they based the ordinance were of a very different character.[8]

In *city of Providence v. Stephens,*[9] the court, when rather reluctantly sustaining an enabling act in so far as it authorized the creation of districts from which apartments might be prohibited, says:

"The legislature with some ground of reason may have determined that in such districts the public safety would be promoted by lessening the peril from fire; that by restricting to a certain extent the congestion of population the public health would be promoted; the danger from the spread of contagious diseases would be decreased; and that these circumstances of particular benefit to the residents of that district would inure to the public good of the community as a whole."

This sort of talk may bring the legislation within ancient pronouncements on the police power, but no one seriously pretends that a modern apartment house produces any of these dangers.

In Welch v Swasey,[10] an ordinance was sustained, which limited the height of buildings in certain districts, largely residential, to eighty feet and one hundred feet, and in certain other districts, largely commercial to one hundred and twenty-five feet, on the ground "that the safety of adjoining buildings, in view of the risk of falling walls after a fire, may have entered into the purpose of the commissioners." In accepting such a justification for the regulations, the court was somewhat embarrassed by the fact that the higher buildings were permitted in the more congested area and where the buildings were closer together. The court hinted at the real basis of this sort of regulation in saying that such regulations, ". . . should be imposed only in relation to the uses for which the real estate will be needed, and the manner in which the land is laid out, and the nature of the approaches to it," but did not pursue this line of inquiry further.

In what has now become the leading zoning case,[11] the court gives some recognition to the real basis of zoning legislation. It relies chiefly, however, upon the notions which have been voiced by most of the courts in sustaining these ordinances, and in commenting on the cases, says:

"The decisions enumerated in the first group cited above agree that the exclusion of buildings devoted to business, trade, etc., from the residential districts, bears a rational relation to the health and safety of the community. Some of the grounds for these conclusions are—promotion of the health and security from injury of children and others by separating dwelling houses from territory devoted to trade and industry; suppression and prevention of disorder; facilitating the extinguishment of fires and the enforcement of street traffic regulations and other general welfare ordinances; aiding the health and safety of the community by excluding from residential areas the confusion and danger of fire, contagion and disorder which in greater or less degree attach to the location of stores, shops and factories."

This line of reasoning may be sufficient to sustain a prohibition of commercial or industrial uses from areas branded as residential, but it is not enough to sustain other aspects of the ordinance which court had under review, such as a complicated system of building height limitations, applying alike to commercial as well as residential districts or to regulations of billboards and signs. (Nor does it assist in sustaining a provision prohibiting

5. Cusack Co. v. City of Chicago, 267 Ill. 344, 108 N. E. 340, 242 U. S. 526, 37 Sup. Ct. Rep. 190.
6. State v. City of New Orleans, 154 La. 271, 97 So. 440.
7. Miller v. Board of Public Works, 195 Cal. 477, 234 Pac. 381.
8. Thille v. Board of Public Works, 82 Cal. App. 187.
9. 47 R. I. 287, 133 A. 614.
10. 364, 118 Am. St. Rep. 533, 79 N. E. 745, 214 U. S. 91, 29 Sup. Ct. Rep. 567.
11. Euclid v. Ambler Realty Co., 272 U. S. 365, 47 Sup. Ct. Rep. 114.

two-family dwellings from certain residential districts, though this particular provision was not involved in the case as it came before the Supreme Court.) It is significant that the tract of land involved in this case contained sixty-eight acres and was at the time vacant.

The Real Considerations Prompting Enacting of Zoning Ordinances

No one will deny that more effective police and fire protection and possibly some improvement in public health and morals, result ultimately from proper zoning. It has not been the crime wave, however, nor the fear of conflagrations, nor the fear of contagious diseases that have prompted eight hundred and forty-one cities to adopt zoning ordinances.

Such considerations are by no means a sufficient explanation of a modern comprehensive zoning scheme. They may explain the segregation of noxious trades, or possibly even of all commercial uses, but zoning goes much, much further than that. They do not explain the imposition of very intricate and very differing regulations to the various districts. The state can scarcely be more solicitous of the health or the safety or the morals or the "welfare" of people who live on one side rather than the other of a more or less arbitrarily drawn line. If a duplex dwelling may be prohibited in one district on the grounds of health and safety, it is embarrassing to try and justify ten story apartments in another. If a building setback line of thirty feet in some districts may be justified on such grounds, how can we justify one of ten feet in others, and none at all in still others? And on such grounds it is still more difficult to explain the application of different lot size and side-yard requirements in certain defined residential districts from those in other residential districts, as has been done in some instances.

On analysis the primary objects of zoning are found to be, not so much the protection of public health and safety, as the protection of the value and usefulness of urban land, and the assurance of such orderliness in municipal growth as will facilitate the execution of the city plan and the economical provision of public services.

Zoning results chiefly from an appreciation of the "inter-dependence of adjoining parcels of land" in urban centers; from a realization that the value and usefulness of each parcel, not only to the owner but to the community, is vitally affected by the use made of the adjoining parcel. It is predicated upon a basic principle of urban land economics, that a certain conformity in use stabilizes and insures the value of land. It recognizes further that in any given city only a certain proportion of land can profitably be employed for certain uses as, for example, for commerce or for apartments, proportions fairly easy of computation when certain factors are known, and that the value of all land is enhanced by properly restricting the various types of use.

In a discussion of zoning in Vol. 1 of the "Regional Survey of New York and Its Environs," just published, we find this significant statement:

> "This, then is the type of control needed: That which will insure the fullest use of space facilities available, consistent with the functioning and future development of the entire area, which will allocate to each industry its real costs, and will prevent the parasitic encroachments of lower functions upon the facilities of the higher functions."

Zoning ordinances are evidence of a legislative recognition of what is fast ripening into a new property right, which might be termed, a restrictive easement against what someone has called "illegitimate and unfair non-conformity" in use of the adjoining or neighboring parcels. They recognize that a property owner has a right to expect the municipality in some degree to protect his property from the blighting effect of non-conforming uses. As pointed out in the "Regional Survey of New York and Its Environs" quoted above:

> "It so happens that unless social control is exercised, unless zoning is fully and skillfully applied, it is entirely possible for an individual to make for himself a dollar of profit, but at the same time cause a loss of many dollars to his neighbors and to the community as a whole, so that the result is a net loss."
>
> "The truth is that an individual simply by buying title to a single lot should not be given the right to use it as he chooses, whenever by merely buying a lot he does not meet its full site cost. Zoning finds its justification in that it is a useful device for insuring an approximately just distribution of costs, of forcing each individual to bear his own expenses."

Even in the decisions we find the courts, behind the talk about public health and safety, hiding a feeling that after all it isn't fair to permit a man to erect a store, however sanitary, in a block of small homes, or a five-story apartment house, however safe, on a lot between two gardened homes.

Zoning is, of course, closely related to the furnishing of primary municipal services, such as streets and sewers. Only by controlling to some degree the future population and character of use upon given areas and the proportion of impervious covering on given areas, can a city properly plan the size and location of streets and sewers. Zoning is the foundation upon which any permanent city planning must be built. But even from a purely public point of view the primary object of zoning is to insure a maximum economic use of all land in the city. As said by Dr. Robert Murray Haig:

> "Regional planning based upon economic analysis and operating through zoning restrictions is the intelligent method of bringing about a truly economic layout of the metropolis."

The city planner in preparing a zoning ordinance, is not concerned with whether people ought to live in apartment houses, but how many are likely to want to, and where such structures may most profitably be located; not whether grocery stores are a menace to public health and safety, but how many are likely to be needed and where they may most economically be permitted. But when he writes his ordinances he puts his tongue in his cheek and recites, "This ordinance is adopted to protect the public health, safety, morals and general welfare." The lawyers taught him to say that, and in doing so they have only added confusion to a legal problem already sufficiently complicated.

For example, in a booklet entitled, "Guide to Los Angeles County Zoning Ordinances," the studies upon which the ordinance was based are listed as follows:

1, Map showing all existing uses of land in the district; 2, Topographical map of the area; 3, Property values per front foot; 4, Private deed restrictions; 5, Transportation systems; 6, Commercial and industrial conditions; 7, Major and secondary highways; 8, Such other studies as are necessary to arrive at a logical solution of the problem; and later on we are told, "The Zoning ordinance is

administered under the same power which gives the county the right to segregate those having contagious diseases. . . ."

It cannot be denied that certain aspects of zoning ordinances have as one of their objects the assurance of adequate light and air and the prevention of overcrowding. Such aspects are supplementary to the building code and only incidental to the general purpose of zoning. In any attempt to sustain all aspects of a comprehensive ordinance on such grounds alone, it is impossible to escape the logic of the court in *People ex rel Friend* v. *City of Chicago*[12]:

"But even if the municipality is clothed with the whole police power of the state it would still not have the power to deprive a citizen of valuable property rights under the guise of prohibiting or regulating some business or occupation that has no tendency whatever to injure the public health, or public safety, or public morals or interfere with the general welfare . . . The city has no power to declare all retail stores nuisances per se when it is within common knowledge that they are not so in fact."

Or even more convincing logic of the court in *Willison* v. *Cooke*[13]:

"A store building is in no sense a menace to the health, comfort, safety or general welfare of the public; and this is true whether it stands upon the rear portion of the lots upon which it is erected, or is constructed to the line of the street; but even if it could be said that its construction imperiled or threatened harm to others, such obligations would in no sense be removed by the consent to its construction by the majority of the owners of property in the same block on the same side of the street . . ."

Two questions, partly legal and partly politic in character, are raised by zoning and similar legislation: How far may a city go in regulating the use of private property in order to facilitate the carrying out of the city plan? and how far may or should a city go in regulating the use of private property in the protection of adjoining and neighboring property? The legal line will, of course, have to be drawn by the cases as they arise. But no satisfactory working solution will be formulated until frank recognition is given to the essentially economic, as well as the social, basis of such types of regulation. As long as ordinances are sustained or rejected, depending upon whether some vague relation to the public health and morals can be found, so long vacillation, uncertainty and occasional injustice continue. If the real purpose of such legislation is frankly recognized, it will be much easier to determine when it becomes arbitrary and discriminatory.

Recognition of Economic Aspects of Zoning Need Not Affect Constitutionality

It is difficult to understand why the courts in passing upon the validity of regulatory legislation have become so wedded to the phrase, "public health, safety, morals or general welfare." It is elementary that all governmental powers not expressly delegated to the Government are reserved to the states.[14] It is equally elementary that these powers are unlimited except in so far as they may conflict with the powers delegated to Congress, as they may be limited by Section 10 of Article 1, or by the 13th, 14th or 15th Amendments.

The fourteenth amendment invalidates any statute which is arbitrary and discriminatory, and as such, a usurpation of power. It is a guarantee of protection to the individual against "any arbitrary deprivation of life or liberty or arbitrary spoliation of property."[15]

It does not purport to define the police power or to limit its scope. As Chief Justice Taney said in the *License Cases*,[16] the police powers of a state "are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions," and as Justice Holmes said in *Noble State Bank* v. *Haskell*,[17] the police power "extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong preponderant opinion to be greatly and immediately necessary to the public welfare." And in speaking of the fourteenth amendment Mr. Justice Field in *Barbier* v. *Connolly*[18] said: "But neither the amendment—nor any other amendment—was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity."

It is submitted that the test of the validity of legislation under the 14th amendment and analogous provisions of the state constitutions, is not whether it serves any particular public purpose, but whether it serves a public purpose, and whether or not it involves such a deprivation of property that it passes beyond the line of legitimate regulation and becomes a taking for public use for which compensation must be paid.

If the primary objects of zoning are those indicated, and they are not a sufficient justification for legislative control of the development of private property, zoning ordinances should not be sustained. That the protection of property values and the insurance of some decree of orderliness in urban development are proper purposes of legislation, however, seems scarcely open to question. The mere fact that 841 cities have adopted zoning ordinances indicates that some such control is "held by strong preponderant opinion to be greatly and immediately necessary to the public welfare." It can scarcely be deemed arbitrary or unreasonable to require such conformity in use and manner of development as will prevent an owner from so using his property as to unduly impair the usefulness and value of neighboring property, or to so segregate various uses as to insure some design in municipal development.

In some decisions and in some of the more recent statutes these considerations have been recognized.

The Illinois zoning enabling act gives as one of the purposes for which zoning ordinances may be adopted, "that the taxable value of land and buildings throughout the city . . . may be conserved," and the Illinois Supreme Court in sustaining an ordinance passed under it said, "zoning necessarily involves a consideration of the community as a whole and a comprehensive view of its needs." In sustaining the comprehensive zoning ordinance of Minneapolis, the court in *State ex rel*

12. 261 Ill. 16; 103 N. E. 609.
13. 54 Colo. 320; 130 Pac. 828, 44 L. R. A. n. s. 1030.
14. United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588.
15. Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. Rep. 357, 28 L. Ed. 923.
16. 5 How. 504, at 582, 12 L. Ed. 256.
17. 219 U. S. 104, 31 Sup. Ct. Rep. 186.
18. (Supra.)

Beery v. *Houghton*,[19] said, ". . . the construction of such apartments or other like buildings in a territory of individual homes depreciates very much the values in the whole territory." In *Herring* v. *Stannus*,[20] the court sustains an ordinance adopted under the state enabling act, the first section of which began, "It is recognized and hereby declared that the beauty of surroundings constitutes a valuable property right which should be protected by law. . . ." In no case has the reciprocal aspect of zoning restrictions been more clearly perceived than in *Piper* v. *Ekern*.[21]

"Such regulation affecting the owners of property in a given area to a large extent, is founded upon the mutual and reciprocal protection which owners of property derive from a general law, and while in a sense a material diminution in value may result, nevertheless a reciprocal advantage occurs which in many instances it is impossible to estimate from a financial standpoint, but which nevertheless constitutes a thing of value and a compensating factor for the interference by the public with property rights."

In the recent case of *Wulfson* v. *Burden*,[22] the court in sustaining a general zoning ordinance recognizes that the police power must be given a more liberal scope than is implied by the classic definition.

"The (police) power is not limited to regulations disguised to promote public health, public morals, or public safety or to the suppression of what is offensive, disorderly or unsanitary, *but extends to so dealing with conditions which exist as to bring out of them the greatest welfare of the people, convenience or general prosperity.*"

Importance of Courts Recognizing Real Basis of Zoning and Similar Legislation

Zoning, as anyone familiar with its use by American cities knows, presents an all too available means of arbitrary and discriminatory interference with property rights. It is an easy means of perpetuating local monopolies and of favoring particular real estate and business interests. *Zoning is particularly open to abuse, because, unlike most legislation, it does not create regulations applicable to all property or persons coming within general classifications, but itself determines what property shall come within certain classifications and applies different regulations to the property so classified.*

The court cannot intelligently distinguish between proper and discriminatory regulations if it is satisfied merely to inquire whether the legislative body conceivably may have had in mind some consideration of the public health, safety or morals. For example, a prohibition of commerce may in one instance be proper and legitimate exercise of the zoning power, and in another be an arbitrary and discriminatory abuse of the power, and yet one regulation bear on its face as much relation to the public health, safety or morals as the other.

To be sure the courts must not substitute their opinion for that of the legislative body, but they perform no higher function than that of protecting the owner of property from the abuse of legislative discretion. To perform this function properly when particular instances of this legislation are up for review, a new approach is needed. This sort of legislation particularly must not "be judged by theoretical standards," but rather "by the concrete conditions which induced it."

The courts will soon have up for review a number of difficult but extremely important questions involving new applications of this sort of legislation. May a county zone unincorporated territory in advance of any development? This presents just the situation in which zoning can be most effective with the least interference with the individual owner. Yet it will not be easy to justify such control under the justification for zoning which the courts have usually enunciated. May a city prevent an owner from constructing a building in the bed of a mapped street, or may it prevent him from constructing beyond the proposed future lines of a street which it contemplates widening in accordance with a Major Street Plan? Some such control as this is imperative if city plans are to mean anything. Recent New York legislation authorizes such restrictions. The courts have sustained set-back lines adopted as part of a zoning scheme, but have not yet had occasion, except in Pennsylvania, to pass on building lines designed to protect street widening. May a city through zoning deliberately limit and control the total population on given areas? City Planners are increasingly emphasizing the significance of this sort of control. May a city compel the discontinuance of existing non-conforming uses after a certain period of time? This power has been recognized by the courts of California and Louisiana but it has generally been regarded as a little beyond the line of legitimate regulation. The power must be conceded, however, if zoning is to be really effective, and if injustice is not to be done conforming owners.

These and other questions will only be intelligently answered if the essential purposes of all this type of regulation are frankly recognized and carefully analyzed. The extensive use of the automobile, new methods of merchandising and manners of living are creating new problems in land uses and urban and suburban development. Ingenious attempts to characterize such legislation as something other than it is, to bring it within 19th Century pronouncements on the police power will not suffice.

One result of the failure to predicate properly the power to zone has led some courts recently to adopt an unfortunate attitude toward the most appropriate means of enforcing such legislation. If one of the essential purposes of zoning is the mutual protection of the value and usefulness of neighboring properties injunction proceedings would seem to be the proper and logical means of enforcement. If the legislature may, as is now well established, impress property in a certain district with stringent restrictions, it would seem palpably unfair to say to a conforming owner that he cannot ask a court of equity to restrain his neighbor from violating such restrictions.

Assume for example that, relying upon a zoning ordinance, a person purchases a lot and builds a home in a single family district, and shortly thereafter his neighbor, in violation of the ordinance, proceeds to erect a mausoleum next door. To deny him equitable relief is to give him a right without a remedy. Yet this is exactly what the Supreme Court of California has done.[23] To be sure the Court relied in part upon Section 3369 of the Cali-

(*Continued on Page* 203)

19. 164 Minn. 146, 204 N. W. 569.
20. 169 Ark. 244; 275 S. W. 321.
21. 180 Wis. 536, 194 N. W. 159.
22. 210 N. Y. S. 941, 241 N. Y. 288, 150 N. E. 120.
23. Perrin v. Mountain View Mausoleum Assn., 77 Cal. Dec. 439.

Washington Letter

February 8

Federal Power Commission

ON January 5, 1931, Senator Walsh of Montana moved that the vote of the Senate, taken on December 20, 1930, by which the Senate advised and consented to the nomination of George Otis Smith, Marcel Garsaud, and Claude L. Draper, as members of the Federal Power Commission, be reconsidered, and that the President be requested to return to the Senate the notification of the action in relation thereto.

After lengthy discussion, a vote was taken on January 9th, and by a vote of 44 to 37, the Senate agreed to reconsider the nominations and requested the President to return them to the Senate. President Hoover, in a message to the Senate under date of January 10, 1931, said:

"I am advised that these appointments were constitutionally made, with the consent of the Senate formally communicated to me, and that the return of the documents by me and reconsideration by the Senate would be ineffective to disturb the appointees in their offices. I can not admit the power in the Senate to encroach upon the Executive functions by removal of a duly appointed executive officer under the guise of reconsideration of his nomination.

"I regret that I must refuse to accede to the requests."

Nevertheless, the Senate, on the same date, on motion of Senator Walsh, by a vote of 36 to 23, directed the Executive Clerk of the Senate to place these names on the Executive Calendar. On January 23rd they were recommitted to the Interstate Commerce Committee.

In discussing the motion to reconsider the action consenting to the nominations, and in answer to the question as to the effectiveness of the Senate's action if the resolution were passed, Senator Walsh stated:

"The Senate has not concluded its action. It has purposely withheld final determination of the matter under its rule. The President of the United States knows what the rules of the Senate are. The President of the United States knows that any action taken by the Senate in relation to the confirmation of a nomination may be reconsidered on either of the next two days of actual executive session thereafter. He is bound to take notice of it."

On the other hand, Senator Goff urged that:

". . . there is no authority upon the part of the United States Senate to reconsider these nominations, and that these nominations now have gone beyond the point where the Senate of the United States as a legislative body can assume to exercise any executive authority, such as removal, or any legislative authority, such as impeachment."

While Paragraph 3 of Rule XXXVIII of the Standing rules of the Senate provides that the Senate may reconsider a nomination on motion made on either of the next two days of actual Executive session, paragraph 4 of the same rule provides that nominations confirmed or rejected shall not be returned by the Secretary to the President until the expiration of the time limited for making a motion to reconsider, "unless otherwise ordered by the Senate."

Referring to the notification, Senator Goff says:

"The Senate did in all these cases waive the two days' notice, because as soon as these men were confirmed the Vice-President or the President pro tempore said, 'The nomination has been advised and consented to, and the President will be notified.' If that is so, the Senate in open executive session waived any right then to turn back after this notification and this justification of the action on the part of the Executive and say, 'We had two days' time in which to recall all of these things. Mr. President, return these papers to the Senate, in order that the Senate may, because'—if I may use the term—'of some newly discovered evidence, revoke the action which it has taken.' We do not as a legislative body, Mr. President, desire to add any such confusion whatsoever to our proceedings."

On the contrary, Senator Walsh says:

"It is perfectly obvious that it is a waiver of the time prescribed by the rule for giving the notice, and that is all it is. The President would be notified in due course under the rule if no such action were taken. But we agree that he may be notified at once, so the waiver is only as to the time within which notice shall be given."

January 23rd, Attorney General Mitchell made public a letter addressed to the President, dated January 10th, in which he expressed the opinion that the appointments of the members of the Federal Power Commission "were constitutionally made" and that "no action which the Senate could now take would disturb or operate to revoke the appointments."

Construing the Senate Rules, the Attorney General says: "It carries the inference that if notification of confirmation be transmitted to the President, the Senate loses the power of reconsideration if the President should act on the notification by making an appointment before a request for return of the notification is delivered to him." The Attorney General also said "that orders in that form for immediate notification of the President are in accordance with the traditional practice of the Senate, and that the Secretary of the Senate was justified in treating these orders as authority for immediate notification."

On January 26th, by a vote of 8 to 3, the Senate Judiciary Committee ordered a favorable report to the Senate on the resolution introduced January 23rd by Senator Walsh of Montana, (S. Res. 415) requesting the United States attorney in the District of Columbia to institute quo warranto proceedings against the three members of the Federal Power Commission. (S. Report 1371).

On January 28th, Senator Deneen, from the Committee to Audit and Control the Contingent Expenses of the Senate, reported the resolution favorably to the Senate without amendment.

On February 4th, the nominations of Messrs. Draper and Garsaud were again confirmed by the Senate, but by a vote of 33 to 40, the Senate refused to confirm the nomination of George Otis Smith to be a member of the Commission.

On February 5th, without a record vote, the Senate adopted the Walsh Resolution (S. Res. 415) requesting the United States Attorney for the District of Columbia to institute quo warranto proceedings for the removal of Chairman George Otis Smith from membership on the Federal Power Commission.

Bill Defining Petty Offenses

On January 15, 1931, the President approved the bill (H. R. 9985) to amend the National Prohibition Act by defining petty offenses and fixing lesser punishment for slight violators. The measure reads as follows:

"Be it enacted . . . That the proviso in the first section of the Act entitled 'An Act to amend the National Prohibition Act, as amended, and supplemented,' approved March 2, 1929 (United States Code, Supplement III, title 27, Section 91), is hereby amended to read as follows:

"Provided, That any person who violates the provisions of the National Prohibition Act, as amended and sup-

plemented, in any of the following ways: (1) By a sale of not more than one gallon of liquor as that word is defined by section 1 of Title II of said Act: Provided, however, That the defendant has not theretofore within two years been convicted of a violation of the said Act or is not engaged in habitual violation of the same; (2) by unlawful making of liquor, as that word is defined by said section, in an amount not exceeding one gallon in the production of which no other person is employed; (3) by assisting in unlawfully making or unlawfully transporting of liquor, as above defined, as a casual employee only; (4) by unlawfully transporting not exceeding one gallon of liquor, as above defined, by a person not habitually engaged or employed in, or not theretofore within two years having been convicted of a violation of such law, shall for each offense be subject to a fine of not to exceed $500 or to be confined in jail, without hard labor, not to exceed six months, or both."

On January 20th Representative Sinclair introduced H. R. 16389 to amend Section 2 of the Act entitled "An Act to Supplement Existing Laws Against Unlawful Retraints and Monopolies and for Other Purposes," approved October 15, 1914 as amended.

On January 26, 1931 Representative Colton introduced H. R. 16589 to amend Sections 17 and 27 of the General Leasing Act of February 25, 1920.

On January 10th, Senator King introduced S. 5648, providing for judicial review of certain decision of executive officers.

Bill Authorizing Courts to Modify or Dismiss Temporary Injunctions or Restraining Orders

On January 19th Senator Sheppard introduced S. 5778, providing "That where a court of the United States has issued a temporary injunction or a temporary restraining order, it shall have power to modify or dismiss such injunction or order after giving opportunity for hearing and evidence on both sides of the controversy without concurrence in such action of any other judge or judges."

On January 6th Representative Fitzgerald introduced H. R. 15778 and on January 29th H. R. 16694, both being "to repeal obsolete sections of the revised statutes omitted from the United States Code as obsolete although not repealed."

Norris Bill S. 4357—Limiting Jurisdiction of Federal Courts

When this bill was reached on the Senate Calendar, January 26th, Senator Copeland objected to its consideration. Senator Norris stated that "there is no possible hope of enacting it into law at this session of Congress." He stated that he intends to introduce the identical bill at the next session of Congress.

Anti-Injunction Legislation

When S. 2497, referred to as the Shipstead Anti-injunction Bill, was reached on the Senate Calendar, it was passed over at the request of Senator Fess.

Bill Providing for Waiver of Trial by Jury in the District Courts

The bill, H. R. 12056, providing for waiver of trial by jury in the district courts was passed over January 26, 1931 at the request of Senator McKellar.

On January 15th the bill (H. R. 14055) to make permanent certain temporary judgeships was reported to the House with amendments and placed on the Union Calendar, (House Report 2279).

On January 19th Representative Graham introduced H. R. 16344 to amend the first paragraph of Section 24 of the Judicial Code. The amendment adds the following to the first paragraph of section 24:

"That where a corporation organized under the laws of one or more States or under the laws of one or more foreign countries, carries on business in a State other than one wherein it has been organized, it shall for purposes of jurisdiction in a district court of the United States be treated as a citizen of such State wherein it carries on business as respects all suits brought within that State between itself and residents thereof and arising out of the business carried on in such State.

"Sec. 2. This amendment shall apply to all suits brought after the expiration of ninety days from its passage, but shall not apply to any suit brought before the expiration of that period."

Wickersham Commission Report on Enforcement of the Prohibition Laws

From the conclusions and recommendations of the National Commission on Law Observance and Enforcement, whose report was submitted to Congress by the President, on January 20, 1931, we find among other things, that the Commission is opposed to repeal of the Eighteenth Amendment; restoration in any manner of the legalized saloon; to the Federal or State Governments, as such, going into the liquor business; and the proposal to modify the National Prohibition Act so as to permit manufacture and sale of light wines and beer.

Under the heading, "Improvements in the Statutes and Regulations" the Commission says that the "whole series of statutes, with such amendments as may be called for towards better enforcement, should be put into a single, thoroughly revised statute." As to uniform state laws, in aid of the National Prohibition Act, the Commission states: "It is doubtful if the advantages of a movement for uniform state laws would be enough to justify the effort." The Commission does "not think it advisable to alter the federal law with respect to search and seizure, assuming that it would be possible." Nor does the Commission favor imposition of penalties upon purchase of illicit liquor, on the theory that it "would increase rather than reduce, the difficulties of enforcement." On the subject of rewarding those who detect conspiracies or large scale violations, or sharing penalties and fines, the Commission is "satisfied that it would be a mistake to extend a division of penalties as a feature of federal enforcement of prohibition," since "this device has been tried in the liquor legislation of some of the states with the bad results which have usually attended it."

The Commission renews its recommendation made previously for legislation making the procedure in so-called padlock injunctions more effective, stating as a reason therefor that "the need of such legislation has been recognized by judges who have sat in injunction proceedings."

Under the hearing "The necessity of Federal control," the Commission states that "Under any régime there will always be a need of Federal action to protect the systems of the several States, whether the State systems are prohibition or State conduct of the business or State control or State regulation. . . . Of course, it is recognized that active cooperation by the State governments always will be required for effective control."

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JOSEPH R. TAYLOR,
MANAGING EDITOR

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CAN SUCH THINGS BE?

The lawyer when acting for a client examines every business proposition with especial care. He is particularly alive to suggestions of fraud. He does not pay much attention to the unsupported statements of strangers. He is from Missouri. Thus he waxes fat in practice and in public confidence and his clients rise up and call him blessed.

The picture perhaps is not overdrawn with reference to the great majority of lawyers. But there are evidences not a few that when dealing with matters of mere personal concern the description does not fit. The complaints that are privately heard from time to time from lawyers who have been induced by smooth agents to subscribe to some fly-by-night "law list," without the slightest assurance that it is even regarded as a reputable concern in its class, give evidence that undue credulity still flourishes in unsuspected quarters where the lawyer's sense of the guardianship of clients' interests is not summoned to his aid. The word "sucker" has a most unpleasant and undignified sound and, so far as we know, has not yet received a final and definite judicial construction. Hence we do not use it in this connection, although the temptation to do so is naturally very strong.

We are not speaking of those well known and long established legal directories, which perform a different function and serve a real need, but it is estimated that there are from 125 to 150 of these "law lists" being operated in the country, of which quite a number are pure and unadulterated frauds. They flourish because the lawyer is taken in by the representations of the solicitor, which he apparently accepts at face value, without investigation, and does not take the trouble to look into the proposition until he has parted with his money and finds he has gotten nothing in return. Sometimes the solicitor bolsters his sales talk with a recommendation on a reproduction of a letterhead of some well known law firm, and the victim takes that—also without investigation as to whether the recommendation is genuine and the use of the letterhead authorized — as "confirmation strong as proof of Holy Writ."

Here are the words of one who has recently looked into "the ways that are dark and the tricks that are vain" of some of these fly-by-night law lists: "A lawyer who would not buy a dime's worth of corporate stock without careful investigation will give up two hundred and fifty or three hundred or five hundred dollars to a man he never saw before on the strength of a lot of glib statements of what he will be able to do for him if he but subscribes. . . . There is no way to protect that man against himself that we know of except to endeavor to educate him."

This gullibility in quarters that should above all be immune from such weakness is one of the most astonishing things in the age in which we live. Shakespeare's words come naturally to mind:

"Can such things be
And overcome us like a summer's cloud
Without our special wonder?"

"A TEMPERATE AND JUDICIAL PRESENTATION"

The report on the Enforcement of the Prohibition Laws of the United States, made by the Commission on Law Observance and Law Enforcement, is accurately described by President Hoover as "a temperate and judicial presentation." He rightly adds that "it should stimulate the clarification of public mind and the advancement of public thought."

A document of such character is itself a novelty and a real achievement in the field of the prohibition controversy. So far as we are informed, this is the first time that an attempt at a fair and unbiased in-

vestigation of the whole subject has been made. The search for facts, where there has been any search at all, has generally been a mere endeavor to find the facts to support a preconceived opinion. Where they appeared to support a particular view, they were received with joyful acclaim and where they had an opposite tendency, the effort was to explain them away as far as possible. It is refreshing at last to have a presentation that reflects in every line the honest effort of able men to determine the realities of the situation and to appraise them justly.

This carefully prepared and highly informative report contains the answers to hundreds of questions from the intelligent inquirer. We venture to predict that anyone who takes the trouble to read it will find that he understands the breadth and scope of the whole situation as he never did before. There is a complete and heretofore unattempted summary of all the important aspects of the problem. And what an astonishing picture it is! The country enters upon a gigantic experiment with its customary lack of preparation for all great undertakings. It has only a small force to carry out its will, and a large part of this is incompetent, underpaid, and hence very subject to temptations. Politics intervenes, corruption follows, public opinion becomes alienated to a large extent, states fail to furnish the cooperation which is admittedly absolutely necessary to secure real enforcement. Improvements are made in the personnel after many futile years, and better results are achieved—but not good enough to keep the Commission from recording the conclusion that, in its opinion, "there is yet no adequate observance or enforcement."

But there is another side to the picture. The saloon at least has gone and the Commission is opposed to its restoration in any manner. Some economic benefits seem clear. "Looked at over the decade of prohibition," says the Report, "the most that may be said with assurance is that there has been a real and far-reaching improvement in the efficiency of labor, especially in mechanical industries. Even if we concede the contentions of some labor leaders that in the last few years there has begun to be an increase in drinking among workers, an improvement remains. In an industrial country, in an industrial age, this established fact, must be of great weight." There is, we are told, a clear preponderance of evidence to establish a gain in standards of living among those with whom social workers come in contact. These gains should be held in any program of liquor control, according to the Commission.

But what program should be adopted? The Commission is not agreed on this important point. The members are agreed as to the factual findings, but not in all the conclusions to be drawn from them. But this disagreement does not represent failure at their task. It is itself factual and significant. It is a clear presentation of the honest differences of view that able men may take of the same facts. It is a part of the whole great picture of conditions that the Commission has so ably drawn.

The crux of the whole question is, of course, the enforceability of the Eighteenth Amendment and the Prohibition Statute. If they can't be enforced, the question ends there. There is no disagreement on the point that cooperation of the state enforcement agencies, induced by favorable public opinion, is necessary to anything like satisfactory enforcement. Can this public opinion be mobilized successfully and this cooperation be sufficiently secured? Opinions differ, but the seriousness of the problem is recognized by all. Two members of the Commission favor absolute repeal of the Eighteenth Amendment and four of them are for "revision," giving Congress power to regulate and prohibit—which is of course a partial repeal. Five, including the Chairman, oppose repeal, although four of this number favor revision of the Amendment if after a fair trial, which they insist has not yet been had, it be found that it cannot be enforced. Each member gives very good reasons for his position in the personal statement which follows the Report and which is really to be taken as an important part of that document. And the Commission, taken as a whole, is in favor of reasonable effort to improve enforcement as long as the Eighteenth Amendment remains in force. A number of really constructive suggestions in this direction are made by it.

The Report has not "solved the liquor problem." That problem may never be completely solved. Few social problems are. A "modus vivendi," satisfactory for a generation or two, may be all that can be hoped for. But the Report has helped in two ways: it has given an honest and clear picture of the conditions that now exist and it has set an example of fairness and restraint in the method of discussion.

REVIEW OF RECENT SUPREME COURT DECISIONS

Questions Certified to Supreme Court Must Be Distinct and Definite and Will Be Dismissed for Objectionable Generality—Requisition of Water Rights for War Purposes—New Jersey Statute Regulating Commission to Be Paid by Fire Insurance Company to Agents Held Within Police Power—Interstate Commerce Commission Without Jurisdiction Over Special Fund in Corporate Reorganization—Validity of Federal Income Tax on Profits From Sale of Municipal Bonds—Validity of State Franchise Tax Measured by Income Not Directly Taxable

By Edgar Bronson Tolman*

Appellate Procedure—Certified Questions

Questions certified to the Supreme Court must be distinct and definite, and will be dismissed for objectionable generality.

The essence of the Fifth Amendment is its application under all the circumstances of a given case. A question whether one who had operated a radio broadcasting station under a license from the Secretary of Commerce prior to the enactment of the Radio Act of 1927, and had developed a following of listeners and advertisers and had thereby established a going business, had acquired property within the protection of the Fifth Amendment is not distinct and definite and will be dismissed for generality.

White v. Johnson, Adv. Op. 137; Sup. Ct. Rep. Vol. 51, p. 115.

This opinion, delivered by Mr. Justice Roberts, disposed of five questions certified by a circuit court of appeals relating to the rights of one holding a license to operate a radio broadcasting station. The appellant owned and operated such a station under a license from the Federal Radio Commission, to broadcast on a wave length of 1340 kilocycles with a power of 500 watts. Before its expiration the appellant sought to have it renewed. The Commission, however, modified the license by limiting the power to 100 watts, so that the area served was reduced to about one-fourth of its former size, with a consequent reduction of his listening public and advertising clientele. The value of the equipment used was about $5,000 and some $16,000 were expended in its operation. Net profits under the original license were about $400 per week. The equipment used will not operate satisfactorily at 100 watts, and a substantial portion of the apparatus will have to be replaced to operate under the modified license.

Instead of appealing under the statute to the District of Columbia Court of Appeals, the appellant chose to stand on his alleged constitutional rights and filed a bill *quia timet* to enjoin criminal proceedings against him for violation of the order. The district court dismissed the bill and an appeal was taken to the circuit court of appeals which certified to the Supreme Court the questions considered in this opinion. That Court dismissed the certificate for objectionable generality.

The inquiry made in the first question was in substance whether the owner of a broadcasting station who had engaged in the continued operation of the station under license from the Secretary of Commerce prior to the Radio Act of 1927, and had developed a following of listeners and advertisers constituting a going business had acquired property in the continued operation of the business, with power appropriate to continue to operate it within the meaning of the term "property" in the Fifth Amendment. The remaining questions related to subordinate matters and were contingent upon whether an affirmative answer was given to the first question.

Citing Rule 37(Par. 1) of the Supreme Court Rules, that "only questions or propositions of law may be certified, and they must be distinct and definite," Mr. Justice Roberts stated the chief objections to the questions, as follows:

> The court has repeatedly held that it will not answer questions of objectionable generality. . . And a question is improper which is so broad and indefinite as to admit of one answer under one set of circumstances and a different answer under another. . .
>
> The first question inquires merely whether the employment of tangible property in an existing business begets in the proprietor a "property" in the continuance of the business, as the word "property" is used in the Fifth Amendment. It is so broad and indefinite that an answer would not necessarily be of assistance in the decision of the cause. It was never intended that in answer to a question certified, we should give a dissertation on the application of the Fifth Amendment. Were we to attempt to do so, we should have to assume the existence of facts and circumstances, the absence of which from the record might render our statements wholly irrevelant. . . The essence of the amendment is its application under all the circumstances of a given case. A broad statement as to whether a thing or a status is property within its intent might well be meaningless or misleading.
>
> Much argument was directed to the proposition that one who first establishes a broadcasting station in and serves a given area thereby appropriates that portion of the ether which he employs or through which the station's radio activity operates; and it was suggested that in analogy to the doctrine as to appropriation of waters, *et id omne genus,* a property right is thus acquired. It was urged that the question presents this proposition; but it clearly fails so to do. We are not required to answer it.

The second and third questions, relating to waivers of constitutional guarantees, required to obtain a license, were not answered because contingent on the first.

The fourth question asked was, whether if it be decided that the license holder has acquired property in the business by affirmative answer to the first question, the Radio Act of 1927 was valid in that it authorized the Commission to refuse to renew a license, or to grant it on terms destructive of the license holder's

*Assisted by James L. Homire.

going business. In addition to the objection that this question was contingent on the first question, MR. JUSTICE ROBERTS pointed out another.

> An answer would involve merely an examination of the Act and a determination whether on its face it violates the Fifth Amendment. Neither this Court nor the court below is authorized to answer academic questions. The constitutionality of a statute is not drawn into question except in connection with its application to some person, natural or artificial. We have above called attention to the provisions of the Radio Act which give redress against arbitrary or unjust action by the Commission. We repeat that the appellant did not see fit to avail himself of the right of appeal thereby conferred, but on the contrary chose to violate the Commission's order and to stand on an alleged constitutional right which he says the action of the Commission infringed. It would be subversive of all established principles were courts, in litigations between parties, who have reciprocal rights under the Constitution, to settle their controversies by broad statements to the effect that acts of Congress are unconstitutional upon their face; and this not only in ignorance of the circumstances and manner of the application of the statute by the administrative body, but with knowledge that the party complaining had failed to pursue the remedy provided by law.

The fifth question, likewise dependent on the first, inquired whether the Radio Act was unconstitutional in laying down as a standard for guidance of the Commission merely whether the application for renewal serves "public interest, convenience, or necessity" and in that it fails to require the Commission to specify, prior to a hearing, in what respect the application will not serve public interest, convenience or necessity. As to this, the Court called attention to the fact that the appellant's rights, as respects procedure, depend not alone on the terms of the statute, but as well upon the adequacy of the hearing in fact afforded.

> If the proceeding was an unfair one, as lacking adequate notice, full hearing, or development of all relevant facts, appellant had a remedy provided by the statute, which in the orderly processes of the administration of the law he was bound to pursue. To answer the question as framed we should have to treat the proceedings before the Commission as irrelevant; to hold that body's interpretation of the language of the act as applied to appellant in all the circumstances of his case as of no moment; and to ignore his admitted failure to avail himself of the right of review conferred by the statute. The question need not be answered.

The case was argued by Mr. Henry K. Urion for the appellant, and by Mr. Solicitor General Thacher for the appellees.

Eminent Domain — Requisition of Water Rights for War Purposes—Lessee's Right to Compensation

A lessee having the right to take a specified quantity of water from a power canal is entitled to compensation from the United States for the taking of such right, when the government in furtherance of the national defence in time of war requisitions the total output of electrical power from the lessor's plant, thereby necessitating a total suspension of the lessee's right to take water from the canal under the lease, notwithstanding the fact that the requisition was in the form of a contractual arrangement with the lessor.

International Paper Co. v. United States, Adv. Op. 232; Sup. Ct. Rep. Vol. 51, p. 176.

The petitioner, International Paper Company, sought to recover compensation in the Court of Claims for property rights in water of the Niagara River, which it alleged had been taken by the United States for war purposes. The Niagara Falls Power Company owned water rights in and lands on the American side of the river above the falls, including a power canal. Through this it was authorized to take 10,000 cubic feet of water per second. By conveyance and lease, the petitioner was entitled to draw 730 cubic feet per second, which right was a corporeal hereditament and real estate under the law of New York.

In December, 1917, the Secretary of War notified the Power Company that the President, by virtue of authority vested in him and by reason of the exigencies of national security requisitioned the total output of electrical power which the plant was capable of producing, and immediate delivery was ordered, with assurance that just compensation would be paid for the power delivered. Simultaneously, the Secretary of War, "acting for and in behalf of the United States" waived delivery of the power to the United States on condition that the Power Company deliver power to certain companies in accordance with a schedule, and the Power Company waived its right to compensation, if permitted to carry on business consistently with the exigencies of national security and defence. The petitioner was not included in the companies named to which power was to be delivered. Next day the Secretary advised the Power Company that all water was requisitioned, and that it was intended to cut off water being taken by the petitioner. Accordingly the petitioner's water was cut off from February 7 to November 30, 1918, at a cost to the petitioner in direct overhead expense of $304,685.36, as found by the Court of Claims. That Court, however, dismissed the petition.

On certiorari this judgment was reversed by the Supreme Court in an opinion by MR. JUSTICE HOLMES, who said:

> The Government has urged different defences with varying energy at different stages of the case. The latest to be pressed is that it does not appear that the action of the Secretary was authorized by Congress. We shall give scant consideration to such a repudiation of responsibility. The Secretary of War in the name of the President, with the power of the country behind him, in critical time of war, requisitioned what was needed and got it. Nobody doubts, we presume, that if any technical defect of authority had been pointed out it would have been remedied at once. The Government exercised its power in the interest of the country in an important matter, without difficulty, so far as appears, until the time comes to pay for what it has had. The doubt is rather late.

Consideration was given also to the contention that there was no taking of the water rights, but merely a making of contractual arrangements and that in any event the United States could revoke the license to take the water.

> But the Secretary of War did not attempt to pervert the powers given to him in the interest of navigation and international duties to such an end. He proceeded on the footing of a full recognition of the Power Company's rights and of the Government's duty to pay for the taking that he purported to accomplish. There is no room for quibbling distinctions between the taking of power and the taking of water rights. The petitioner's right was to the use of the water; and when all the water that it used was withdrawn from the petitioner's mill and turned elsewhere by government requisition for the production of power it is hard to see what more the Government could do to take the use. It is true that the petitioner did not come within the scope of the Government's written promise to pay. But the Government purported to be using its power of eminent domain to acquire rights that did not belong to it and for which it was bound by the Constitution to pay. It promised to pay for all the power that the canal could generate. If it failed to realize that the petitioner had a right to a part of the power, its clear general purpose and undertaking was to pay for the rights that it took when it took the power. . .
>
> Our conclusion upon the whole matter is that the Government intended to take and did take the use of all

the water power in the canal; that it relied upon and exercised its power of eminent domain to that end; that, purporting to act under that power and no other, it promised to pay the owners of that power, and that it did not make the taking any less a taking for public use by its logically subsequent direction that the power should be delivered to private companies for work deemed more useful than the manufacture of paper for the exigencies of the national security and defence.

MR. JUSTICE MCREYNOLDS, MR. JUSTICE STONE and MR. JUSTICE ROBERTS dissented.

The case was argued by Mr. John W. Davis for the petitioner and by Mr. Claude R. Branch for the respondent.

Insurance—Regulation of Agent's Commissions

The New Jersey statute forbidding a fire insurance company to allow any agent a commission in excess of a reasonable amount or to allow to any local agent a commission in excess of that allowed to any other agent on similar risks, is a valid exercise of the police power of the state, consistent with the due process clause of the Fourteenth Amendment.

O'Gorman & Young Inc. v. Hartford Fire Insurance Co., Adv. Op. 162; Sup. Ct. Rep. Vol. 51, p. 130.

The two cases disposed of in this opinion involved consideration of the constitutional validity of a statute of New Jersey regulating the commissions paid by fire insurance companies to their agents. The courts of New Jersey sustained the statute, and on appeal their ruling was upheld by the Supreme Court in an opinion by MR. JUSTICE BRANDEIS, though four of the Justices dissented.

The statute in question provides that it shall be unlawful for an insurer to allow any commission to an agent in excess of a reasonable amount, or to allow to any agent any commission in excess of the commission allowed to any other local agent on the class of insurance in question.

In one of the cases suit was brought to recover the balance alleged to be due under a contract terminable at will, made prior to the enactment of the statute by which the insurer had agreed to pay 25% of the premiums as commission. The other action was under a contract to pay the reasonable worth of the agent's services, the complaint alleging 25% of the premiums to be such reasonable worth, but that only 20% had been paid. The defendants, as a defense, set up the statute and the fact that since its enactment the compensation paid several local agents was only 20% of the premiums on the same class of business.

In upholding the statute the opinion of the majority pointed out that the insurance business is affected with a public interest so that its rates may be regulated and the relations of those engaged in its business; that the agents' commissions bear a direct relation to the rates charged, and that there was nothing in the record to show that the statute was not an appropriate remedy for evils present in the business in New Jersey. Concerning these aspects of the case MR. JUSTICE BRANDEIS said:

> The business of insurance is so far affected with a public interest that the State may regulate the rates. . . . ; and likewise the relations of those engaged in the business. . . The agent's compensation, being a percentage of the premium, bears a direct relation to the rate charged the insured. The percentage commonly allowed is so large that it is a vital element in the rate structure and may seriously affect the adequacy of the rate. Excessive commissions may result in an unreasonably high rate level or in impairment of the financial stability of the insurer. It was stated at the bar that the commission on some classes of insurance is as high as thirty-five per cent. Moreover, lack of a uniform scale of commissions allowed local agents for the same service may encourage unfair discrimination among policy holders by facilitating the forbidden practice of rebating. In the field of life insurance, such evils led long ago to legislative limitation of agents' commissions.
>
> The statute here questioned deals with a subject clearly within the scope of the police power. We are asked to declare it void on the ground that the specific method of regulation prescribed is unreasonable and hence deprives the plaintiff of due process of law. As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute. It does not appear upon the face of the statute, or from any facts of which the court must take judicial notice, that in New Jersey evils did not exist in the business of fire insurance for which this statutory provision was an appropriate remedy. The action of the legislature and of the highest court of the State indicates that such evils did exist. The record is barren of any allegation of fact tending to show unreasonableness.

MR. JUSTICE VAN DEVANTER, MR. JUSTICE MCREYNOLDS, MR. JUSTICE SUTHERLAND and MR. JUSTICE BUTLER delivered a dissenting opinion, expressing the view that the statute constituted an unwarranted abridgement of freedom of contract, beyond the power of the legislature. The question raised was stated:

> The matter for our consideration comes to this: A foreign insurance Company, licensed to operate in New Jersey, employed an agent and agreed to pay reasonable compensation. The agent demanded 25% of the premiums collected. The Company paid 20% of these and successfully resisted the claim for more upon the sole ground that "since twenty per cent is the amount of commissions paid to some of its local agents, the effect of this legislation (Act March 29, 1928) is to determine that a commission in excess of that is unreasonable." Abstractly stated, the principal paid "A" commissions at the rate of 20%; therefore, it has been held solely because of the Act nothing above 20% can be recovered by "B," who claims under a contract fair on its face and not expressly inhibited, which definitely provides for reasonable compensation.

In discussing the law, the dissenting Justices urged that the appellant was not under the burden of establishing any underlying disputable fact before challenging the statute.

> It cannot rightly be said that the burden of establishlishing any underlying disputable fact rests upon the appellant before it can successfully challenge the validity of the questioned enactment. This is not a proceeding to enjoin enforcement of a statute because of alleged discrimination or other circumstance, the existence of which requires consideration of facts not known to the court. Opinions in cases of that character are not in point. The court below ruled, in effect, that without regard to any evidence which might be presented the complainant, although relying upon a contract fair upon its face, could recover nothing above the rate allowed to another agent—that the statute restricted the right to contract for services for reasonable compensation. And we must determine whether thus construed, and in the absence of any emergency, the statute necessarily conflicts with the Fourteenth Amendment. Is such legislation permissible in the ordinary circumstances of which the court must take judicial notice?

German Alliance Ins. Co. v. Kansas, 233 U. S. 389, was then referred to as admitting the legality of fixing rates for fire insurance policies by statute, but as marking, also, the extreme limit to which the Court has gone in upholding price-fixing statutes. The distinction between the power to fix rates and the power to regulate incidental costs was then emphasized.

> The public has no direct, immediate interest in the agency contract here set up. Its concern is with rates. Like any other expense item brokers' commissions may ultimately affect the rate charged for policies; but this is true of the wages of office boys, printers, bookkeepers,

actuaries, officers; the price paid for pens, ink, or other supplies—indeed whatever expense may be incurred. Broadly speaking the funds of an insurance company come from premiums collected; and necessarily all disbursements are made therefrom and therefore in some sense may be said to affect the necessary rate of charge. . .

Even if it be admitted that the power of the legislature to establish reasonable rates for insurance necessarily presupposes existence of the right to command or inhibit what is essential to the accomplishment of that end, certainly this implied right extends to nothing which does not clearly appear to be necessary for such purpose.

The statute under review does not prescribe a schedule of rates or point out the basis for determination of reasonable rates; it leaves with each company the primary right and duty of deciding upon rates to be demanded. But it inhibits payment to any agent, irrespective of the worth of his services and without regard to any contract with him, of anything in excess of what may be actually paid to another agent. As construed, it declares that the smallest compensation voluntarily paid to any agent shall thereby become reasonable for every other agent. And it permits an agent who has been paid according to his agreement to recover more if he can show that some other agent has received greater compensation.

The objections to the statute, no extraordinary conditions having been disclosed by the defendant, should be obvious. It goes far beyond the mere regulation of the business of insurance and interferes directly with the right of insurers to control the conduct of their internal affairs; it restricts the right of both company and agent to make reasonable private agreements in respect of compensation for ordinary services; and the restrictions have no immediate or necessary relation to the maintenance of insurance rates fair to the public.

The case was argued by Mr. Walter Gordon Merritt for the appellant, and by Mr. Ralph E. Lum for the appellees.

Interstate Commerce Commission — Jurisdiction Over Issuance of Securities in Corporate Reorganization

Where stockholders in a railroad corporation, which has been through mortgage foreclosure proceedings, create a special fund for the payment of fees and disbursements of the reorganization managers, and the corporation resulting from the reorganization has no legal right in or to such fund, it is not subject to the jurisdiction of the Interstate Commerce Commission. In such case the Commission in the exercise of its powers over the issuance of securities under §20(a) of the Transportation Act, cannot make its order approving the issuance of securities by the new corporation subject to a condition that approval, by the Commission or the Court, shall be first obtained before payments shall be made out of the special fund so created.

United States v. Chicago, Milwaukee, St. Paul & Pacific R. R. Co., Adv. Op. 142; Sup. Ct. Rep. Vol. 51, p. 159.

The opinions in this case relate to the validity of a condition attached to an order of the Interstate Commerce Commission approving the issuance of securities by an interstate carrier by rail, and to the jurisdiction of the federal courts to annul the condition as part of the order. On both questions there was a division of opinion in the Court. MR. JUSTICE SUTHERLAND delivered the opinion of the majority, holding the condition illegal, and that it was such a part of the order as to fall within the statutory provision enabling the federal courts to annul any order of the Commission in whole or in part. Dissent from these views was expressed by MR. JUSTICE STONE, with whom MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS concurred.

The Commission's order approved the issuance of securities pursuant to a plan for reorganization of the Chicago, Milwaukee & St. Paul Railway Company, which had passed into a receivership and had been the subject of a mortgage foreclosure. The reorganization plan provided that stockholders might participate in the reorganization by depositing their shares of stock together with $32 for each share of preferred and $28 for each share of common stock. In return for each share the depositor was to receive common and preferred stock in the new company, and in addition, $28 and $24, respectively, in 5% bonds of the new company. This left a balance of $4 per share, of which $1.50 was "set aside to provide for the compensation of the reorganization managers and the committees * * * and the fees and disbursements of their counsel and all depositaries and sub-depositaries, any balance of said sum to be paid over to the new company as additional working capital or if the reorganization managers in their discretion shall so determine, to be returned *pro rata* to the holders of certificates of deposit for stock." The discretion so to be exercised was to be absolute and uncontrolled. The managers' compensation was fixed by agreement, and compensation of committees was to be fixed by the managers, unless the plan was abandoned, in which case none was to receive compensation. Payment to other persons was to be made whether the plan should be carried out or abandoned. The remainder of the $4 fund was to be used for the expenses of foreclosure, court costs, engraving of new securities, etc., any balance to be paid to the new company.

The Commission first granted a certificate of public convenience and necessity authorizing the new company to acquire the lines of the Chicago, Milwaukee and St. Paul, and also entered an order pursuant to section 20(a) of the Transportation Act of 1920 authorizing the new company to issue the securities described in the report and order, but added the following proviso:

> Provided, however . . . that the applicant . . . (b) shall impound in a separate fund the money received from the payment by holders of preferred and common stock in an amount equal to $4 a share, which shall not be paid out unless and until so authorized by order of the court in respect to payments subject to the court's jurisdiction or by this commission.

Whether or not this proviso as related to the $1.50 fund, was a lawful condition under the statute, and if not, whether the federal courts had authority to enjoin the Commission from enforcing it were the questions raised in the appeal.

The Transportation Act, section 20(a) makes it unlawful for a carrier to issue securities without an order from the Commission authorizing the same, and confers upon that body the following powers in relation to such orders:

> "(3) The Commission shall have power by its order to grant or deny the application as made, or to grant it in part and deny it in part, or to grant it with such modifications and upon such terms and conditions as the Commission may deem necessary or appropriate in the premises, and may from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of the foregoing paragraph (2)."

These provisions of the statute were, in the opinion of the majority of the Court, insufficient to

justify the Commission in its attempt to exercise jurisdiction over the special fund of $1.50 per share.

> The legality of the acquisition and operation by the new company of the lines of railroad theretofore owned by the old company is not now in question. The requisite certificate of public convenience and necessity was issued by the commission. The order of the commission authorizing the new company to issue securities was made after a finding of all the facts required by the act as a necessary basis therefor. By subdivision (3) of §20a the commission is empowered to make its grant of authority to issue securities upon such conditions as the commission may deem necessary or appropriate in the premises. The power to impose such conditions, however, is not unlimited and may not be exercised arbitrarily or (since Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard) . . . unless there be found substantial warrant for the conditions in the applicable standards established by the provisions of the act relating to such securities. The powers possessed by the commission are delegated by Congress under, and are to be exercised in conformity with, the constitutional grant of authority to regulate interstate and foreign commerce. Proceeding under that grant, as applied to the present matter, neither the commission nor Congress itself may take any action which lies outside the realm of interstate commerce. . . It follows that if the condition in question relates not to such commerce, or to the rights or duties of the carrier engaged in such commerce, but exclusively to extrinsic matters, it is imposed without authority of law.

The private character of the contract relating to the special fund was then emphasized—that it was made to provide compensation for the managers for services rendered on behalf of the depositors, that neither company was party to it, that the new company had no enforceable interest in it, and that the new company agreed to pay all expenses other than such as were to be paid by the special fund.

> If the security holders, instead of agreeing to the provision for a special fund incorporated in the body of the reorganization plan, had bound themselves by a separate contract to compensate the managers and others for their services in behalf of the security holders, and had placed a sum of money in the hands of a trustee to secure payment of the estimated amount, as they well might have done, it probably would not have been contended that the commission lawfully could impose upon the issue of securities the condition that the new company should take control of this money or that it should be paid out under the direction of the commission. But in principle how does the case under review differ from the case supposed? The agreement in respect of the special fund, though contained in the body of the plan, is in effect as distinct as though it had been made by separate contract. It seems plain enough that the commission, by the condition here in question, has undertaken to lay its hands upon and control the disposition of a fund created by contract between private persons to which the carrier was not a party, in which the carrier had no enforceable interest, and which was not within the purview of the regulating power of the commission. The most that can be said is that the creation of the special fund—like production or manufacture of commodities . . . "may (or may not) result in bringing the operation of commerce into play." The contract was not one in respect of commerce but involved a transaction distinct and complete in itself without regard to its results; and, whether succeeded by commerce or not, was no part of it.

After pointing out that the difference between the status of the $2.50 fund, to the balance of which the new company had a right, and the status of the $1.50 fund in which it had no interest, MR. JUSTICE SUTHERLAND concluded his discussion of this question as follows:

> The power to regulate commerce is not absolute, but is subject to the limitations and guarantees of the Constitution, among which are those providing that private property shall not be taken for public use without just compensation and that no person shall be deprived of life, liberty or property without due process of law. . . Both the liberty of contract and the right to property here are involved. The contract was valid and had been so adjudged by the court having jurisdiction of the foreclosure and sale. The parties to it were willing and were entitled to have the contract executed according to its terms. There is no power in any department of the government to order otherwise. And certainly a carrier whose only interest in the property lies in the speculative possibility that some remnant of it in the future may come to the carrier as a *gift* is in no position to take it as of *right* without compensation. In that view, any legislative or administrative edict which purports to empower the carrier to take the property without compensation and dispose of it, not as the contract provides, but as the governmental body may direct, must fail as a futile attempt to accomplish what the Constitution does not permit.

The remainder of the opinion was devoted to the government's contention that the courts have no jurisdiction to annul a condition upon which the order is granted after the authority granted has been exercised. In rejecting this contention the Court pointed to the analogy that an unconstitutional condition imposed by a state upon the grant of a privilege, which might be withheld unqualifiedly, may be ignored or enjoined without loss of the privilege granted.

> Broadly stated, the rule is that the right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provisions of the federal Constitution. . .
>
> Without attempting to determine how far this principle may be carried in its application to orders of the Interstate Commerce Commission, or attempting to formulate any general rule in respect thereof, we are of opinion that the principle does apply to the order now under review; and for present purposes that is enough.

In conclusion reference was made to portions of the Commission's report which were thought to indicate that the Commission approved the reorganization plan on its merits, and that it did not regard the condition in question as a basic part of the order.

> The order in itself, being complete and self-sustaining and resting upon grounds found to be sufficient to support it, cannot be made to depend upon submission to a collateral condition, which, as we have shown, is beyond the statutory and constitutional power of the commission to impose. Whatever may be the general rule, we have no difficulty in concluding that, under the circumstances above recited, the principle in respect of the separability of unconstitutional conditions imposed upon a privilege granted by a state is applicable to the present order of the commission—and for a stronger reason, since that body, unlike a state in the class of cases referred to, does not possess the power arbitrarily to deny the authority here sought by the carrier.
>
> From the foregoing it results that the condition in respect of the special fund of $1.50 per share was properly set aside and its enforcement enjoined by the court below.

MR. JUSTICE STONE expressed the opinion that the order as conditioned, was valid, and in any case that it should not be permitted to stand as an approval of the issuance of securities after the condition had been stricken from it. In elaboration of these views the purpose of the statute was discussed.

> The obvious purpose of subsection (2) of §20(a) of the Transportation Act is the prevention of any issue of securities by a rail carrier unless the Interstate Commerce Commission, "after investigation . . . of the purposes and uses of the proposed issue and the proceeds thereof, . . . finds that such issue . . . is . . . compatible with the public interest, . . . and . . . reasonably necessary and appropriate" for the corporate purposes of the carrier. I suppose no one would doubt, and the opinion of the Court seems to concede, that if the assessments which, under the reorganization plan, were to be levied upon the stockholders of the old company, were all to be paid into the new one in exchange for the new

securities, it would have been the duty of the Commission to investigate the purposes and uses of the new issue and its proceeds; and if it found that the issue to raise a fund for the payment of extravagant reorganization expenses was not compatible with the public interest, or reasonably necessary and appropriate for the corporate purposes of the new company, the Commission could have refused to approve it. Under subsection (3) the Commission could have provided against improper expenditures by annexing to its order the very condition which it added in the present case.

It was also pointed out that the reorganization managers, bankers of the old company, had dominated the entire reorganization, and that the plan called for payment by each stockholder to provide funds to meet obligations of the old company and expenses of launching the new company, including payment of the managers.

It would seem that technical distinctions between possible methods of procuring payment of the last from funds raised by a security issue of the new company ought not to affect the authority of the Commission. I should have thought that, under our decisions, the Commission, where its order controls only the action of the appellee, might look through legal forms and, disregarding the corporate entity of appellee, treat the action of the reorganization managers, in dealing with the sums paid by the stockholders for the new stock of appellee, as that of their creature and *alter ego*, the appellee. . .

To say that so much of the reorganization agreement as related to the creation and expenditure of the $1.50 fund for the payment of these expenses was a mere private agreement, unrelated to the issue of securities, with which the Commission is vitally concerned, is to ignore its plain terms and disregard its practical operation.

MR. JUSTICE STONE also referred to the purpose of the Transportation Act to preserve for the nation the transportation system as a whole, and the fact that the stability of the credit of the carriers generally is affected by the cost of reorganizations.

In concluding discussion of the propriety of the condition and the Commission's power to make it the learned Justice said:

If the Commission, as I think it might, could have refused to approve the present issue of securities on the ground that they were to be issued to procure payment of reorganization expenses which were or might be excessive, then, plainly, under the provisions of subsection (3) and within the purview of subsection (2), it could have made its consent to the issue conditional upon the modification of the plan, in such manner as to preclude the payment of unreasonable expenses. Appellee was not obliged to comply with the condition, since it was not compelled to proceed with the plan, although compliance with it, through the exercise of the power of the managers to modify the plan, would not, so far as appears, have been impossible or even difficult. But as the condition was one which the Commission had power to impose, appellee, having accepted the plan, cannot repudiate the condition.

In the dissenting opinion it was urged further that a court of equity should not aid the carrier in repudiating a condition attached to approval of a plan after it had accepted a transfer of the railroad in accordance with the plan.

If appellee were unable or unwilling to comply with the order as made, equity and good conscience required, at least, either disclosure of that fact to the District Court before securing the transfer of the railroad property to it; application, upon full statement of the facts, to the Commission to exercise the jurisdiction, which it had reserved, to approve a modified plan; or prompt initiation of the present proceedings to test the validity of the order before a situation had been created prejudicial to the public interest and to the Commission's performance of its duties. Instead, appellee adopted a course of conduct consistent throughout only with its apparent purpose to comply with the order; and now, without tendering any excuse for the belated disclosure of its real purpose, it asks relief from the condition only after it has enjoyed benefits which it cannot be said would have been granted without the condition. Neither this Court nor the court below is acting any the less as a court of equity because its powers are invoked to deal with an order of the Interstate Commerce Commission. The failure to conform to those elementary standards of fairness and good conscience which equity may always demand as a condition of its relief to those who seek its aid, seems to require that such aid be withheld from this appellee.

In the dissenting opinion it was urged further that the order should not be permitted to stand as approval of the issuance of securities independent of the condition, thereby precluding the Commission from the performance of its statutory function.

The judgment below, as interpreted by this Court, not only makes effective an order different from any the Commission has granted, but precludes any future action by the Commission in the performance of its statutory duty. In this respect the case differs from those in which this Court has set aside an unconstitutional condition imposed by state legislation on a foreign corporation seeking to do business within a state. In those cases the judgment of this Court in no way restricts the further exercise of the legislative power of the state in any constitutional manner. Here the Commission is ousted from the exercise of power which Congress has given it, and an order is sanctioned authorizing an issue of securities which it cannot be said the Commission has approved, and which this Court does not purport to say is appropriate under the statute.

The CHIEF JUSTICE did not participate in the case.

The case was argued by Assistant to the Attorney General John Lord O'Brian for the appellants and by Mr. John W. Davis for the appellee.

Taxation—Validity of Federal Income Tax on Profits from Sale of Municipal Bonds

Income in the form of profits derived from the sale of municipal bonds does not fall within the rule forbidding the imposition of a tax by the federal government upon instrumentalities of a state, in the absence of proof that, as a practical matter, such tax adversely affects the borrowing power of the state or municipality.

Willcuts v. Bunn, Adv. Op. 155; Sup. Ct. Rep. Vol. 51, p. 125.

This case raised the question whether profits derived from the sale of municipal bonds are taxable under the federal Revenue Act of 1924. The taxpayer paid under protest an additional income tax of $85.44 on profits derived from the sale of bonds of municipalities in Minnesota. The district court and the circuit court of appeals held the profits not taxable and gave judgment for the taxpayer. On certiorari this was reversed in an opinion by the CHIEF JUSTICE.

In defining the limits to the question presented it was pointed out that the statute exempts from taxation "interest upon the obligations of a State, Territory or any political subdivision thereof," but that this has never been construed to extend to profits derived from the sale of bonds. It was further pointed out that no question was raised as to the authority of Congress to tax profits from the conversion of capital assets, nor sales of securities issued at a discount, so that the profits might be considered as in lieu of interest.

Whatever questions might arise in cases of that sort are not now before the court. The present case is simply one of profit obtained from purchase and sale, without qualification by any special circumstances.

In approaching the question the Court recognized the importance of the principle that there is in the Constitution an implied prohibition on the federal government's powers of taxation against taxing the instru-

mentalities of the states, in order to maintain effectively our dual system of government.

> The limitation of this principle to its appropriate applications is also important to the successful working of our governmental system. The power to tax is no less essential than the power to borrow money, and, in preserving the latter, it is not necessary to cripple the former by extending the constitutional exemption from taxation to those subjects which fall within the general application of non-discriminatory laws, and where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government. This distinction has had abundant illustration.

After a review of cases illustrating the application of the rule of immunity from taxation, including cases forbidding a tax on the interest from municipal bonds, the Court adverted to the distinction between a tax on municipal bonds or interest from bonds and a levy on profits from the sale of such bonds.

> But it does not follow, because a tax on the interest payable on state and municipal bonds is a tax on the bonds and therefore forbidden, that the Congress cannot impose a non-discrimnatory excise tax upon the profits derived from the sale of such bonds. The sale of the bonds by their owners, after they have been issued by the State or municipality, is a transaction distinct from the contracts made by the government in the bonds themselves, and the profits on such sales are in a different category of income from that of the interest payable on the bonds. Because the tax in question is described as an "income tax" and the profits on sales are included in "income," the distinction is not lost between the nature of a tax applied to interest and that of a tax applied to gains from sales. The federal income tax acts cover taxes of different sorts. . . The tax upon interest is levied upon the return which comes to the owner of the security according to the provisions of the obligation and without any further transaction on his part. The tax falls upon the owner by virtue of the mere fact of ownership, regardless of use or disposition of the security. The tax upon profits made upon purchases and sales is an excise upon the result of the combination of several factors, including capital investment and, quite generally, some measure of sagacity; the gain may be regarded as "the creation of capital, industry and skill."

Since the tax on the profits derived from the sale of the bonds was concluded to be not a tax on an instrumentality of the state, attention was given to the further question whether the tax is invalid because of an inseparable relationship between sales of such securities and the borrowing power of the state.

> If the tax now in question is to be condemned, it must be because of practical consequences and not because purchases and sales by private owners of state and municipal bonds are a part of the State's action in borrowing money. It would be far-fetched to say that such purchases and sales are instrumentalities of the State. They are not transactions made directly or indirectly in behalf of the State or in the course of the performance of any duty of the State. Sales are merely methods of transferring title to the obligation, that is, the right to receive performance of the promise of the State or municipality.
>
> That a transfer of government bonds is not inseparably connected with the exercise of the Government's borrowing power so as to make the transfer *per se* immune from taxation is clearly demonstrated by the decisions upholding nondiscriminatory taxation laid upon the transmission of such securities upon the death of the owner.

In regard to the contention based on the practical consequences of upholding such a tax the Court found nothing in the record to show that it constituted an undue burden on the state's borrowing power.

> It is urged, however, that a federal tax on the profits of sales of such securities should be deemed, as a practical matter, to lay such a burden on the exercise of the State's borrowing power as to make it necessary to deny to the Federal Government the constitutional authority to impose the tax. No facts as to actual consequences are brought to our attention, either by the record or by argument, showing that the inclusion in the federal tax of profits on sales of state and municipal bonds casts any appreciable burden on the State's borrowing power. We are left to the inadequate guidance of judicial notice.

In conclusion the importance of the history of income tax legislation was emphasized as to the practical effect of the imposition.

> There is, however, an outstanding fact, more important than any possible conjecture. That fact is found in uniform and long-established practice. This practice clearly indicates that neither the Federal Government nor the States have found a tax on the profits of the sales of their securities to be a burden on their power to borrow money. So far as we are advised, the Federal Government has not at any time deemed it to be necessary to exempt from taxation the profits realized by owners on the sale of its obligations, with the exception, recently made, of short-term Treasury bills issued on a discount basis and payable without interest. Such profits are included in the general phrase "gains, profits and income" from "sales, or dealings in property," in the Act under consideration. And we understand that under all federal income tax acts, these or similar words have been construed invariably by the administrative authorities as including profits derived from the sale of state and municipal bonds. The present case appears to be the first in which the tax in this respect has been assailed. No State has ever appeared at the Bar this Court to complain of this federal tax, and it is not without significance that in the present instance the States of New York and Massachusetts do appear here as *amici curiae* in defense of the tax.
>
> The history of income tax legislation is persuasive, if not controlling, upon the question of practical effect. . . . Before the power of the Congress to lay the excise tax in question can be denied in the view that it imposes a burden upon the States' borrowing power, it must appear that the burden is real, not imaginary; substantial, not negligible. We find no basis for that conclusion, or any warrant for implying a constitutional restriction to defeat the tax.

The case was argued by Assistant to the Attorney General G. A. Youngquist for the petitioner and by Mr. Charles Bunn for the respondent.

Taxation—Validity of State Franchise Tax Measured by Income Which Is Not Subject to Direct Taxation

The tax imposed on corporations by Section 209 of Article 9-A of the New York Tax Law is in fact as well as in name a privilege tax for the privilege of exercising the franchises in a corporate or organized capacity, and properly may be measured by the net income allocated to business carried on it the state. Income derived from copyrights may be included in the net income, in measuring the tax, even though such income may be immune from direct taxation by the state, as a tax on an instrumentality of the federal government.

Educational Films Corporation of America v. Ward, Adv. Op. 223; Sup. Ct. Rep. Vol. 51, p. 170.

The appellant here sought to enjoin taxing authorities of New York and the Attorney General of that State from collecting a tax imposed by section 209 of Article 9-A of the New York Tax Law, on the ground that, as construed, it infringes the federal constitution.

That section of the Tax Law imposes an annual tax on every domestic corporation of certain classes "for the privilege of exercising its franchise in this state in a corporate or organized capacity." The tax is 4½% of so much of the entire net income for the preceding year as is allocated to business carried on within the state. The net income is defined to include income from any source, including interest on federal, state, municipal or other bonds.

The appellant's income included income received from licensing copyrights on motion picture films. It

challenged the inclusion of the income thus received in measuring the tax, upon the ground first that the copyrights and the income derived from them are instrumentalities of the federal government, which like patents are immune from state taxation; and second, that the tax, as measured by net income, is void as a tax on federal instrumentalities, so far as the measure includes income from copyrights.

The district court of three judges sustained the validity of the tax and dismissed the bill, and on appeal the decree was affirmed by the Supreme Court, though three of the Justices dissented. The majority opinion was delivered by Mr. Justice Stone, who placed the decision largely upon the ground that the tax falls within the class of taxes upheld as a franchise tax, lawfully measured, since it is in reality a tax upon the privilege of doing business as a corporation, net income being merely the measure used in determining the amount of the tax.

Before entering upon an independent inquiry into the practical operation and effect of the tax, MR. JUSTICE STONE referred to two opinions by the New York Court of Appeals, one characterizing the tax as an income tax, and a later one which seemed to regard it primarily as a tax on the privilege of doing business in the state. An analysis of the taxing provision was then undertaken.

> If we look to the operation of the present statute, it is plain that it can have no application independent of the corporation's enjoyment of the privilege of exercising its franchise. If appellant had ceased to do business before November 1, 1929, it would not have been subject to any tax under this statute, although it had received, during its preceding fiscal year, income which the statute makes the measure of the tax. Since it can be levied only when the corporation both seeks or exercises the privilege of doing business in one year and has been in receipt of net income during its preceding fiscal year, the tax, whatever descriptive terms are properly applicable to it, obviously is not exclusively on income apart from the franchise.

The remaining portions of the opinion were concerned with the appellant's contention that the tax, even though a franchise tax, is invalid so far as it is measured by income derived from a federal instrumentality. After discussing cases dealing generally with the problem of construing the reciprocal immunity which both the state and the federal government enjoy from taxation by each other, so as not to restrict unduly their respective powers of taxation, MR. JUSTICE STONE considered cases bearing specifically on the question raised here.

> The precise question now presented was definitely answered in *Flint v. Stone Tracy Co.* 220 U. S. 107, 162, *et seq.*, which upheld a federal tax, levied upon a corporate franchise granted by a state, but measured by the entire corporate income, including, in that case, income from tax exempt municipal bonds. In reaching this conclusion, the Court reaffirmed the distinction, repeatedly made in earlier decisions, between a tax, invalid because laid directly on governmental instrumentalities or income derived from them, and an excise which is valid because imposed on corporate franchises, even though the corporate property or income which is the measure of the tax embraces tax exempt securities or their income.

Various analogous cases were cited in support of the conclusion reached, in which income had been included in measuring a permissible tax, though the income could not have been taxed directly.

> It is said that there is no logical distinction between a tax laid on a proper object of taxation, measured by a subject matter which is immune, and a tax of like amount imposed directly on the latter; but it may be said with greater force that there is a logical and practical distinction between a tax laid directly upon all of any class of government instrumentalities, which the Constitution impliedly forbids, and a tax such as the present which can in no case have any incidence, unless the taxpayer enjoys a privilege which is a proper object of taxation, and which would not be open to question if its amount were arrived at by any other non-discriminatory method.
>
> This Court, in drawing the line which defines the limits of the powers and immunities of state and national governments, is not intent upon a mechanical application of the rule that government instrumentalities are immune from taxation, regardless of the consequences to the operations of government. The necessity for marking those boundaries grows out of our Constitutional system, under which both the federal and the state governments exercise their authority over one people within the territorial limits of the same state. The purpose is the preservation to each government, within its own sphere, of the freedom to carry on those affairs committed to it by the Constitution, without undue interference by the other. . .
>
> Having in mind the end sought, we cannot say that the rule applied by this Court for some seventy years, that a non-discriminatory tax upon corporate franchises is valid, notwithstanding the inclusion of tax exempt property or income in the measure of it, has failed of its purpose, or has worked so badly as to require a departure from it now; or that the present tax, viewed in the light of actualities, imposes any such real or direct burden on the federal government as to call for the application of a different rule.

In conclusion the Court discussed the history of the taxing provision, but found in the various amendments broadening its scope nothing to indicate that there had been any change made to strike directly at income from copyrights.

> But the statute, before these amendments, was sufficiently broad to include income from copyrights within the measure of the tax; and neither before nor after the amendments did it make any mention of copyrights or their income. There is nothing to suggest that the legislature could at any time have had in mind the addition of income from copyrights to the measure of the tax, or that the statute or the amendments were adopted "for the very purpose of subjecting" it "*pro tanto* to the burden of the tax," which was declared to be the vice of the statute in *Macallen Co.* v. *Massachusetts, supra,* p. 631. That the royalties play some part in the measure of the tax is the result of the application of the general language of the statute to particular circumstances to which the statute makes no specific reference.

MR. JUSTICE SUTHERLAND, in a dissenting opinion, expressed his view that the provision in question operated to tax income that is immune from state taxation in an unconstitutional manner.

> The duty of this court to examine taxing acts to see that the use of federal tax exempt subjects as a measure for taxes imposed in terms upon taxable subjects is not a cloak, under which the former in substance and effect are taxed, was never more imperative than now, when, by reason of increased and increasing public expenditures, states and municipalities are driven to search in every direction for additional sources of revenue.
>
> The self-evident operation of the provisions of the New York tax law is to cause the tax here in question to fall on an instrumentality of the United States. The statute necessarily exacts tribute from the income derived from that instrumentality. The amount of this tax is the same and its effect, in every respect, is the same as though it had been imposed upon the income in precise terms.

Most of the remaining portions of the dissenting opinion were devoted to sustaining the view that the legislative history of the provision indicates that the very purpose of various amendments to the statute was to enlarge the definition of net income to include that derived from federal instrumentalities. In this connection it was pointed out that after a New York decision holding that the statute did not include income from federal bonds, the legislature amended it specifically to

(*Continued on page* 196)

RETROSPECTIVE DECISIONS AND STARE DECISIS AND A PROPOSAL

By Albert Kocourek
Professor of Law, Northwestern University

In 1792 Sir William Ashhurst, then a puisne judge of the King's Bench, delivered a charge to a Middlesex Grand Jury in which he said: "Happily for us, we are not bound by any laws but such as every man has the means of knowing."

Later, Jeremy Bentham in an article entitled "Truth *versus* Ashhurst" wrote the following lines:

"Scarce any man has the means of knowing a twentieth part of the laws he is bound by. Both sorts of law are kept most happily and carefully from the knowledge of the people: statute law by its shape and bulk; common law by its very essence. It is the judges (as we have seen) that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me. They won't tell a man beforehand what it is he *should not do*—they won't so much as allow of his being told: they lie by till he has done something which they say he should not *have done*, and then they hang him for it."

The same idea is expressed by the contemporary witticism that "Law is that which everyone but the lawyers and judges is bound to know."

We wish to deal here not with the general problem of the uncertainty of "court-house" law, but only with one interesting feature of that body of law—i. e. the retrospective operation of judicial decisions.

Let us assume any situation of fact upon which *A* might be either a plaintiff or defendant. Later, *A* is either a plaintiff or a defendant and the highest court decides. Let us fix the time of decision by the point *x*.

Now let us assume a similar situation of fact also prior to point *x* where *B* might be either a plaintiff or a defendant. It is more than a mere possibility that the same court where *B* is either a plaintiff or defendant, may at point *y* (= after the decision in *A's* case) decide in conflict with the rule applied to *A's* case.

Going a step farther, let us assume a similar situation of fact arising after point *x* and before point *y* where *C* may be either a plaintiff or defendant. It is probable that the court will apply to *C's* case not the rule employed in *A's* case but rather the rule used in *B's* case. A recent newspaper story relates the occurrence of just such a situation where the unfortunate *C* was sentenced to serve a term in the penitentiary. *C's* statement as quoted in the Chicago Tribune (21 December 1930) is interesting. He says:

"I talked with half a dozen attorneys and they didn't know any more than I did. In 1926 the Circuit Court of Appeals held that income from illicit sources could not be taxed. The next year the Supreme Court ruled differently."

Such a conflict of decision may arise either consciously or unconsciously. With the unconscious conflicts we do not here concern ourselves. They are inescapable due to the human elements and factors that enter into the judicial process. We confine ourselves, therefore, to the conscious conflicts. They arise when the court, knowing the rule which has theretofore been applied, chooses to depart from the earlier rule on grounds of justice or policy.

The judicial effect, for the situation assumed, is that *A* may gain a legal title, or recover money damages, or be relieved of capital punishment; that *B*, on the same essential pattern of fact, may lose a legal title, be required to pay money damages, or forfeit his life or liberty; and that *C* relying on the favorable result as to *A* may suffer the consequences which reached *B*.

This curious result as to *C* is produced and justified by a theory known as the "declaratory" theory of precedent. This theory is that courts do not *make* law but only apply it—sometimes correctly and sometimes incorrectly. The same theory also involves the assumption that the law is unchangeable, and that the latest decisions of the highest courts are the best evidence of what is the law. But the theory strictly applied involves another feature of much more importance. The latest declaration of a rule of law is not only the best evidence of the law but it has a retrospective operation embracing all anterior states of fact to which it applies.

All this, of course, is elementary. Holmes, Gray, Salmond, and many others have discussed the matter and it is universally conceded that the Declaratory theory is not only a fiction but also that it is a fiction which when taken seriously often produces bad results. In *Gelpcke* v. *Dubuque* (1 Wall. 175) the fiction was overthrown. In that case it appears that the Supreme Court of Iowa in various decisions had held that municipal corporations could lawfully issue bonds. Later, the City of Dubuque issued bonds. Later still, the Supreme Court of Iowa overruled its former decisions. The necessary effect of the last Iowa decision was to invalidate the bonds because the decision operated retrospectively. The Supreme Court of the United States decided that the bonds were valid. Mr. Justice Miller in his dissenting opinion correctly pointed out that the effect of the decision was an abandonment of the Declaratory theory. The procedural basis of the *Gelpcke* decision has been much discussed.

It is not our mission here to enter into the various constitutional questions involved, but it will complete the background of this discussion if we state in a summary way the attitude of the courts toward the Declaratory theory. Mr. Robert Hill Freeman in an able article entitled "Retroactive Operations of Decisions" (1918) Columbia Law Review 18: 230, 250, has already supplied such a summary which we now quote:

"1. In cases originating in the federal courts, the last decision of a state court, overruling former decisions, will not be followed where to do so would interfere with rights acquired in reliance upon the first decisions.

"2. The state courts, on one theory or another, almost universally protect property rights acquired in reliance upon a statute or constitutional provision as then interpreted by the courts.

"3. Men are not punished as criminals for acts which were done when the highest court of the state had declared them lawful.

"4. The tendency is to extend the same protection to rights acquired in reliance upon decisions interpreting the common or unwritten law."

It is safe to say that there are many hundreds of legal rules, especially those of a ceremonial type, which by general consent of the bar need to be overhauled. The obstructive influence of the rule of Stare decisis

is beyond calculation. The courts have a justifiable fear of changes in the law made on their own motion. Fear of filling up gaps in the law does not deter any judge but there is reluctance to change formulated rules of the common law even when the need clearly appears. The reason is plain. A new rule does not operate only prospectively, as is the method for enacted law by the legislature, but it affects or many affect all past transactions whether then in course of litigation or not. Before an established rule is changed, the judge must attempt to estimate to what extent the rule as changed will affect other concluded transactions. It is apparent that no reliable estimate of this retrospective operation is possible. The apprehension will never correspond with the fact and therefore the maximum of danger must always be the scale of measurement.

The rule of Stare decisis is a custom of the courts. It is binding on inferior courts but it does not control supreme courts. It is not *binding* on supreme courts. For inferior courts, it is a rule; for superior courts it is, in practical effect, only a custom. The social need of certainty in the law is an effective support of the custom of Stare decisis. Inferior courts must follow the rule but supreme courts are controlled chiefly by the social need of certainty in the law. There is a difference here between the United States and England explainable on the ground of difference in location of the law's center of gravity. In England that center is in Parliament; in the United States the center is in the highest courts.

What is needed, of course, is modification of the Declaratory theory with its logical implication of retrospectiveness. Who created that theory? It seems fairly certain that it was not created in Parliament. It seems to have arisen in an age when the Imperative School of Law was in the saddle. Now, if it is true that no Parliament or constitution has forbidden courts to legislate, at least within the limits of private law, and, of course, by an applicative process which conceals the fact of legislation, it may be asked: Why do not the courts at one stroke abolish the Declaratory theory? We can not attempt to exploit the answer here, but we believe that no court in this generation will have the hardihood to do it. To abolish the rule of Stare decisis would be a much less pretentious program and yet no English or American court will announce that program either.

Let us glance for a moment at the Roman law practice. The Roman praetor had no power to legislate but he could accomplish the effect of legislation by allowing or disallowing actions. With the establishment of the Formulary procedure, the praetor's powers increased to such an extent that, like the English chancellor, he could in concrete result, act in opposition to the *ius civile*. In Cicero's time the power of the praetor had so far increased that his edict had become the chief source of law. It does not seem probable that in the further development of judicial powers we shall ever attain the stage where the American judge will be able to say in advance of litigation as did the Roman praetor ". . . on such and such facts . . . *iudicium dabo.*"

There is an enormous practical difference between announcing an act and doing an act. Our courts often depart from the custom of Stare decisis wherever justice and policy seem to require the departure. The courts in like manner sometimes depart from the Declaratory theory whenever justice and policy seem to require that course. But both the rule of Stare decisis and the Declaratory theory (while antagonistic principles, considered separately) are, in unison, an obstruction to a liberal expansion of legal doctrines. The Stare decisis rule (and custom) ought to be liberalized but only on condition that the Declaratory fiction is modified or annihilated.

What is the reason for the survival of the Declaratory theory? The answer we believe is the survival of another fiction known as the Separation of powers. We must pass over also a consideration of this factor in order quickly to reach the conclusion of what is set before us.

The obstructive Declaratory theory should be regulated but the process of regulation by way of the court-house method will need a long period of experimental and interstitial approaches to the result in concrete cases having the necessary effect of enlarging at another point an area of instability in the law. The remedy should come at one stroke from the legislature. It should come in such manner as accords with existing practice and without unduly disturbing the legislature and without raising unnecessarily any constitutional question. The most direct way would be to enact simply the rule that "new declarations of law by the courts shall have prospective operations only." The simplicity and directness of this rule, however, involve the fatal defect that such a rule probably would be unconstitutional as legislative interference with the courts. It will be necessary to proceed more cautiously. An attempt is made (as shown in the draft of a model act at the end of this article) to overcome the objection of legislative interference with the courts. The solution, it is here acknowledged, is sufficiently vague but this vagueness will permit a court to act as it thinks best, and that is precisely what is necessary to avoid interference. There may be left over the residual merit of focusing attention on the problem and of providing a way to minimize the evils of retrospective laws.

There remains another possibility. Perhaps the legislature has the competence to accept as its own, all new rules of law formulated (if not made) by the courts, by one general enactment. So far as concerns future rules or future changes of rules, this suggestion probably could not survive the objection of unconstitutional delegation of legislative power.

Since our present object is accomplished by drawing the attention of the bar to the problem and in emphasizing its importance, we forego here any further consideration of methods of solution. It may, however, be explained that the draft act has the purpose of making certain the second and fourth propositions of Mr. Freeman's summary (above) but that it leaves the third proposition open, on the view that while there may be *reasonable* reliance in socially harmful acts, there can not be *justifiable* reliance, on decisions either antedating or postdating such an act. The same remark applies also to tort acts.

Suppose, for example, the Supreme Court has decided that pursuit to judgment (without collection) of one joint tortfeasor operates to release another. Suppose now a plaintiff in ignorance of the rule or because of want of information of the identity of another (joint) tortfeasor, or for any reason (including the extreme case of knowledge of the rule and all the facts), sues one of two tortfeasors and fails to collect a consequent judgment. What rational ground can be assigned for refusing to permit the same plain-

tiff to proceed later against the other tortfeasor? Can there by any satisfactory reason whether the rule of law was announced before the first action or after it? As between the plaintiff who has been harmed and the tortfeasor, we believe no rational ground exists for refusing the plaintiff satisfaction.

Dean Green has acutely drawn attention to certain policies in the background of legal rules ("Judge and Jury" (1930)). The policy here in the background is the "admistrative factor;" i. e. that the courts are not to be twice vexed with lawsuits that can be administratively disposed of at one stroke. But is that policy so important as to deny a plaintiff material satisfaction against a wrongdoer? Is it not true that plaintiffs may repeatedly vex the courts by the method of non-suit? If the policy is important can there not be invented some other less drastic administrative device to relieve the situation? What is said of crimes and torts is true also of breaches of contract and of breaches of equitable duties. We can find no reason to justify creation of a vested interest in any species of wrongdoing or any reason to work a kind of estoppel favoring any wrongdoer based on judicial decisions in other cases whether before or after the wrongful act. The statute of limitations is a sufficient safeguard to protect the wrongdoer. At any rate, the term "justifiable reliance" in the draft proposed is loose enough to permit keeping the application within the bounds of reason.

It needs here to be pointed out that the Benthamic ideal is not attained by what is being proposed. That ideal can be realized only when a fairly complete code shall be adopted. The prospect is not encouraging. It may therefore happen under what is proposed, where *A* commits a homicide and is acquitted, that *B* later committing a homicide on the same fact pattern, may be hung. If we substitute for the homicide, a legal title to land, we get a different result. This puts the matter in its most striking form. Here Bentham would say that the judges hung *B* after they had in effect told him he might safely kill *X;* although the same judges would protect *B* in a claim of legal title to land simply because before that they protected *A* and where now they say the rule is unjust and should not be applied in future cases.

We readily admit that this contrast between the valuation of liberty and property raises a serious doubt. Some of the hardest battles of the law have been fought on this important position. The forces representing property have in the past won the battles but in the modern era the victories are going to the forces of liberty. But for this problem, it may be noted that people take legal titles on the basis of reliance on legal rules, while the same persons do not commit their homicides, larcenies, and arsons according to a manual of directions. The answer is here left submerged under the expansive safety-valve concept "justifiable reliance."

We therefore now venture to submit a legislative solution which represents a middle-of-the-road course between the two legislative extremes noticed above. It follows:

[Draft]

AN ACT DECLARING THE EFFECT OF JUDICIAL DECISIONS OF THE SUPREME COURT

Sec. 1. The final judicial decisions of the Supreme Court are
(a) Decisive of the rights of the parties.
(b) Declarative of the rules of law for future application which govern the questions raised on the facts presented and decided.

Sec. 2. (1) If the Supreme Court believes that a declaration of rule of law theretofore made by the Supreme Court or by any inferior court is unjust, it will decide the instant case in accordance with the juster rule except
(a) Where the former rule is a basis of reasonsonable and justifiable reliance applicable to the facts of the instant case, or
(b) Where application of a new rule in its judgment will be unduly disturbing to a standard of reasonable and justifiable reliance as to the existence or non-existence of legal relations of other persons not then before the court.
(2) When the Supreme Court refuses to depart from an existing rule in favor of what it pronounces a juster rule on the questions adjudicated, the expression of that view is evidence for future cases of the existence of reasonable reliance.

Sec. 3. Nothing herein shall abridge the duty of inferior courts to apply the declarations of law made by superior courts.

AMERICAN BAR ASSOCIATION COMMITTEE ON COMMERCE

Annual Meeting to Be Held in the Building of the Chamber of Commerce of the State of New York, 65 Liberty St., New York.

Tuesday, Wednesday and Thursday, March 24, 25 and 26, 1931

AGENDA

Tuesday, March 24

10:00 A. M.:
1. Suggestions of
   (a) New business.
   (b) Other subjects than hereon listed.
2. United States Contract and Sales Bill.
3. Bill providing for payment of interest on judgments rendered against the United States.
4. Bill relating to motor vehicles used in Interstate Commerce.

2:00 P. M.:
5. Proposed revision of calendar.
6. Bills of lading for carriage of goods by sea.

Wednesday, March 25

10:00 A. M.:
1. Proposed amendment to Federal Anti-Trust laws.

2:00 P. M.:
2. Proposed amendment to Federal Anti-Trust laws.
3. Federal Trade Commission practice and procedure.
4. Amendments to Federal Arbitration law.

Thursday, March 26

10:00 A. M.:
1. Resale prices—Capper Kelly Bill.
2. Regulation of the sale and distribution of pistols in Interstate Commerce.

2:00 P. M.:
3. Executive Session.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

THE Policeman's Manual, by George F. Chandler. New York: Funk and Wagnalls Co. 1930. Pp. 166.—While of general texts for use in police training schools the present manual is very probably the best, anyone acquainted with writing of this sort will realize how small a compliment is necessarily involved in such a statement. Indeed, the so-called text material is usually only a mass of disconnected and superficial items of information or opinion whose only relation to each other is that they reached the mimeographing machine at the same time. Unhappily, superficiality and disorganization are all too apparent in the present book also, even though written by the former Superintendent of the Department of the New York State Police. It is simply impossible to cover the whole field of police lore in 166 small pages; to attempt it is really to leave to the individual instructor the task of filling out and building up the course. Yet in police schools more than in any others the instructor is likely to be of a sort that needs the constant help of a minute and detailed text.

But even a superficial text can be of some help if it is a logically built skeleton on which the instructor can then hang his own material. Unhappily the present book is not at all logically organized. The structure of the federal government is described in the chapter on Riots. The chapter on Psychology and Leadership, after touching on the appearance and table manners of policemen, jumps without the least transition to the meaning and importance of insanity as a defense to a criminal charge. Other examples might easily be given. There is nothing here to discourage that propensity (already so lively) of police instructors to ramble all around Robin Hood's barn. But if a text neither supplies the material information itself nor sets up a scheme about which to organize and arrange such material gathered from other sources, there is sadly little of usefulness left in it.

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Public Utility Control in Massachusetts, by Irston R. Barnes. New Haven: Yale University Press. 1930. Pp. x, 239.—Here is presented a study of considerable value to the American legal profession, especially in the public utility field. Massachusetts is a pioneer in the field of regulatory machinery of public utilities as well as being known as an exponent of the "prudent investment" theory of the rate base of such utilities. How this State has dealt with the problems of control over security issues and fixation of the "reasonable" rate of return of public utilities within its jurisdiction, is the main consideration of this book by Mr. Barnes. The study was begun by him in the effort to ascertain, by means of cases originating in the administrative and judicial organs, to what extent the so-called "prudent investment" theory had actually been applied by them. In six chapters, the author discusses first the historical development of rate regulation in Massachusetts, through purely legislative control, then later by "weak" commissions without power to enforce their orders, and subsequently by "strong" commissions such as prevail at the present day. Then there is consideration of control over security issues, the bulk of the book being concerned with regulation of rates and a comparison of federal and Massachusetts doctrines as to the rate base. Here, in my judgment, is the real value of the book, as it affords a lucid discussion of the three present outstanding methods of approach to the intricate problem of the reasonable basis of valuation of public utilities.

The author of the book is correct when he states that the supreme court of the United States still follows the "present fair value" rule as the rate base, and that this was laid down originally in 1898 in the leading case of Smyth v. Ames, 169 U. S. 466, even though the rule has been "modified, extended, elaborated, and strengthened" by subsequent decisions. A growing minority of professional opinion, represented by Mr. Justice Brandeis, Dr. John Bauer, and Commissioner Eastman of the Interstate Commerce Commission, has advocated the "prudent investment" theory of valuation, i.e., "the amount of money actually paid into the corporate treasury by the original purchasers of the corporate securities" (p. 167.) The author contends that in the vast majority of cases the Massachusetts commissions have failed "to make any finding as to the appropriate rate base" (p. 194.) and there has been no attempt made to "hold all companies to the same rate of return" (p. 192.) The rate of return itself has been defined in Massachusetts to be "to permit the utilities to earn such return as may be necessary to enable the company to market additional securities at or above par" (p. 193.) If any rate base has been formulated in Massachusetts by the commission, in the words of the author, "it might be said to be the aggregate par value of the outstanding securities, or that sum plus any premiums paid in to the corporate treasury (p. 173.) But is this not the "prudent investment" theory? The contention of the author is in

the negative, as he attempts to show by the application of this formula to various elements of value of the rate base. The final conclusion is that "there are more points of differences between the Massachusetts practice and the prudent investment theory than there are points of resemblance; and that those who have held up Massachusetts regulation as an example of the application of the prudent investment theory are in error, if the theory of prudent investment is employed in any strictly defined sense" (p. 195.)

If the author is correct in his deductions, the query naturally arises, why have not more of the commission decisions in Massachusetts gone to the United States supreme court, where it is admitted that "present fair value" is the controlling factor in determining the rate base? Mr. Justice Brandeis, dissenting in Southwestern Bell Telephone Co. v. Public Service Commission of Missouri, 262 U. S. 276 (1922,) at p. 303, note, says that "no case involving the fixing of rates by a commission has ever come to this court from New England. The only case involving in any way the validity of rates is Interstate Consolidated Street Railway Company v. Massachusetts, 207 U. S. 79." Of course, many factors might be argued to answer this query, not necessarily violative of the author's conclusions. The author further complains of the indefiniteness of the commission's decisions, largely arising from "the failure of the Massachusetts commissions to address themselves to the task of determining a specific rate base or value of the utility's property" (p. 212.) Furthermore, "the decisions suggest that the commission either fails to inform itself as to all the facts in the situation or that it does not lay all its cards on the table. Even after the commission has rendered a decision, it is impossible to discover what rate the utility is permitted to earn, or the basis upon which it is permitted to earn. . . . In this respect, the Massachusetts commission compares unfavorably with the commissions of many other States which are scrupulously careful to present all the evidence and facts upon which their decisions are based" (p. 212.)

The author has dealt thoroughly and painstakingly with a difficult field, and has given careful attention to the cases and the literature on the subject, both in Massachusetts and in the supreme court of the United States. The highest value of the book, in the judgment of the reviewer, is in the discussions relating to the comparative merits of the "present fair value" rule of the federal supreme court, the "prudent investment" theory, and the so-called "Massachusetts doctrine." There is no mention of the problems clustering around the issuance of certificates of convenience and necessity, nor the troublesome problem when a private business transmutes itself into a public utility.

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Year Books of Richard II: 12 Richard II: A. D. 1388-1389: Edited for the Ames Foundation by George F. Deiser. 1930. Cambridge: Harvard University Press. While certain years are missed in some of the other reigns, the printed year books include cases in every reign from Edward I to Henry VIII, except that of Richard II; the reason for the omission is unknown. As this editor points out, through his "twenty-three years of ceaseless turmoil, bad government, broken promises, ceaseless exactions, discontented and rebellious people . . . judges sit, unmindful of the dethronement of their King, of the hangings of lawyers and judges, and dispose of a great volume of litigation," and these "judges are firm and clear-headed."

This volume gives with an accurate translation cases of one year. The sources are twenty-two MSS., two of them of importance,—Sir Matthew Hale's MS. in Lincoln's Inn (where many American and Canadian lawyers saw it in 1923) and the additional MS. in the British Museum.

The language employed is Norman-French, not a patois but a real language, just as is the language of the French-Canadian; it is not modern Parisian French indeed, but neither was the French of Rabelais.

We meet some circumstances of the olden time only,—for example, the Deodand, which has caused a death and is forfeited, and this already not *Deo* but *Regi*. Then we have the serf, who has no right of action against the lord, not even for dower, though a defendant who pleads serfdom in the plaintiff may be mulcted in damages, just as a litigant who denies his own deed may be sent to prison by the judge.

The married woman was still *in manu mariti;* the husband could sue alone on a debt owed to her, with or without her assent, and a widow who sued, praying aid as being "tenant in tail after possibility of issue extinct," was met by the argument that her husband was dead less than a year and "it hath been seen that a wife has been enceinte with child for three years and afterwards has had issue." (Taylor's *Medical Jurisprudence* does not tell us this.) There are many actions for Ravishment of Ward, and it is said from the Bench that an action lies at Common Law for taking away a child.

Beer is somewhat in evidence. A plaintiff is held to be bound by an arbitration and an award of 18 pence and a gallon of beer; a brewer is fined for illegal beer (not too strong, but too weak, according to the *Assisa Cerevisiae*); and a brewer who proceeded against his apprentice under the Statute of Labourers failed when it appeared that he was to be taught "l'art d'estre grossier," the art of being a grocer, whereas the plaintiff "ne savoit rien de ceo art, ne il ne fut nul grossoure einz un braseour," —knew nothing of that art and was no grocer but a brewer. By the way it is said—and denied—that an infant of 12 years of age could enter into a covenant to serve; no judgment is given.

Much of the law is as we now have it. A man may change his name; a deed binds only the parties and those claiming under them, etc. A curious case was as to the right of the King to the forfeiture of goods under seizure for rent; it was held that the right did not subsist, though the result would have been different had the goods been merely pledged.

Perhaps the most interesting case is one of tampering with a jury. This was in Easter Term, 1388. Walter Raynell sued John Cruweys for rent, etc; at the trial, when the jury brought their verdict for the plaintiff, one of them produced in court a bill of certain costs of the plaintiff which he had found at his feet at the house in which the jury

were considering their verdict. The other jurors swore that they knew nothing about this paper, had never seen it or heard of it; but they said that a bailiff had thrown to them a similar paper, saying nothing about it. This they had read and then torn up. The plaintiff admitted that he had given this to the bailiff to be given to the jury. The verdict was set aside; the plaintiff was "in mercy" and had to pay a mark, 13s. 4d., to the King. We have no account of the final outcome.

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From the Physical to the Social Sciences, by Jacques Rueff. Translated by Herman Green. Baltimore: Johns Hopkins Press; London: Humphrey Milford; and Oxford University Press.—Every now and then some book is written so wise, so simple, so stimulating, so satisfying, that it bears reading over and over again. When the book is a little one, written in a style so exquisite that one does not know whether the spell of it is more in the sense or on the senses, it is, like Jurgen's "Cantrap," a thing to conjure by.

Such a little book, so gracious, so appealing, so packed with the substance of thought, so satisfying yet so thought provoking, is Rueff's "From the Physical to the Social Sciences."

Me, a simpleminded but not overcredulous law man, it has wholly captivated. Having little social and less scientific learning, I have read it over and over again, each time stepping down a little more of its electrical content to the comprehension of my mind.

The exercise has charmed and delighted me, and believing that the ordinary lawyer like myself can not read the book without being profoundly impressed, as I have been, by the beauty of its diction, the grace of its expression, and the compelling interest which inheres in its treatment of life, its subject matter, I have, as a labor of love, undertaken its review in the hope that I may induce an ordinary lawyer here and there to put himself also under its spell.

In fifteen short chapters,[1] of a scant hundred pages, the author has presented and powerfully sustained his propositions that there are not many sciences, but one; that the human mind which builds up the sciences and creates their laws proceeds in all sciences alike, because, operating through the reasoning machine, it must, by the very nature of its being, do so.

That it is the extent to which in a particular science man has most recognized the nature and given fullest play to the operation of this machine and not anything inherent in the sciences themselves, which distinguishes the advance of one science over another.

That just as the physical scientist, to explain physical phenomena, creates the causes which satisfy the laws of the mind, so the social scientist, using the same reasoning machine and the same methods, "creates the causes" which at once satisfactorily explain and control the social phenomena which he observes.

That the book, though certainly not written from a controversial standpoint, is essentially controversial; that it presents in the very statement and treatment of its theses matters upon which thoughtful minds, according to their experience and training, will differ, is perfectly evident. But that, accepting the premises upon which the writer proceeds, and going openmindedly along with him, thoughtful minds of all types must feel the profound influence of the book, I think perfectly plain.

Rather in the implications which the book permits to be drawn from what it says than in what it actually says lies its controversial quality. And this is so because while wholly free from direct attack upon old methods, or direct urging of new, and having not even the flavor of propaganda, it yet presents so exquisite and compelling a picture of the creative power of the mind when properly exercised in the field of the physical as well as of the social sciences, as almost to sound a trumpet call.

"Moral theories no more make customs than do our ideas about the constituents of matter make the properties of bodies. Both the former and the latter are created for the sole purpose of explaining a system of appearances which is given to us."

Some have taken the book as at least an indirect preachment for the adoption of entirely new methods in the setting up and regulating of ethical and social systems, ascertainment and working out of social problems, and the solution and settlement of those problems through the "creation of causes" in the field of law.

Some such view, at least in part, seems to have been taken by those who wrote the charming introduction to the book. They seem to think that from Mr. Rueff's book one may draw a sweeping indictment of the legal methods of the past, a pressing invitation to completely new departures.

I do not think so. It seems to me that it does make clear that through a failure to fully realize the nature of the processes by which the phenomena of the social world are observed, and particularly the creative nature of the reasoning machine, by which the laws governing social life are formulated, enunciated and set down, social progress has sometimes been slower and less responsive to social needs than would have been the case had accurate methods of observation and rationalization been consciously used.

Running through the book and dominating it there is the constant assertion upon assertion that though more consciously, and therefore more effectively, in the case of the physical than of the social sciences, the same processes which the physical sciences have employed with so much effect upon man's relations to his physical environment have in fact in the past been employed in the social sciences. On page 65 the writer makes the point clear thus:

"We shall find in the social sciences all the characteristics of the sciences properly called scientific. . . . We in no wise attempt to modify the social sciences in order to bend them to the scientific forms. We affirm, on the contrary, that just as they are now they present all the characteristics of the so-called physical sciences."

It is true that there is an insistence upon the clearer recognition of the nature of the reasoning machine and its power to "create causes" so that we may be better able, with less lost motion, to change and adapt our social laws as we change and adapt to new circumstances in the social world,

just as we are so completely doing in the physical world, where, with the same instrument, the reasoning machine, and by the use of that scientific method which observing phenomena and "creating causes" which satisfy our minds as to the meaning of these phenomena we adjust and adapt ourselves to the changing physical world, and the changing physical world to ourselves.

So much I believe anyone will get from reading the book, and whether he concludes from this for himself that the writer is an undue defender of old, an undue advocate of new methods will depend upon his own point of view as to the relative value of the static and the dynamic, as to the advantage of rest over motion, of change over stability.

But it is not the development of the general idea that the use in the social sciences of critically scientific methods will furnish more accurate bases for our conclusions than the old haphazard method of trial and error have done, which makes the book so distinctive and so charmingly readable.

This of course is due in part to its clear and simple, yet moving style; but the revolutionary, the revealing thing about the book is the point of view of the author, and the exquisite skill displayed in sustaining the point of view that, because it is man's relation to life which is the concern of both, the physical and the social sciences are and have been in fact one; are in fact and have been subject to the same methods of study and experimentation, of trial and error, and that it is just as true of the physical as of the social sciences that the laws with which they are concerned have been not discovered, but created by that same reasoning machine.

That in short, all the sciences in their bases and their methods are and have been substantially the same. Let us see how graphically Rueff puts it:

"We in no wise distinguish the mathematical sciences from the physical or natural, nor from the social sciences. We claim that all sciences are of the same type, each comprising an experimental or observational branch which gleans the facts and extracts therefrom empirical laws, and a rational branch which 'creates causes.'

"Thus the laws of the social sciences take on their true worth. What force replaces . . . the monarchy by the republic, the domestic workroom by the giant factory? That force is life, the entire life of the universe. The life which goes on irrespective of ourselves and because of ourselves, the vast synthesis of all being, the infinite progress whose end we do not know.

"It is life in its course which determines each stopping point, which implies its appropriate laws. . . . We feel consciously the clashing forces out of which the future will be born. It is this immense movement which determines, at each epoch, the reality of the moment."

Long before the end of the book is reached it has become fully evident that Rueff is not writing propaganda; that he is not inciting to action, that he is merely, in a calmly abstract way, examining things as they are and have been for the purpose of showing the complete parallel which exists between the physical and the social sciences; the essential, the inevitable parallel which exists because of the use in both of the same instrument, the human mind, in the service of the same cause, man's place in the total life of the universe, in the observation and analysis of the facts in each of the sciences and the creation of the causes which for the time being, and for the purposes designed, govern these sciences, and increasingly tend to make life livable.

The first four chapters are devoted to the method of approach of the writer to the subject in hand. They present clearly and simply the fundamental propositions which underlie the book—that the reasoning machine, using words for its material and under the rigid and invincible laws of its being, is busy in all of the sciences in empirically observing phenomena and rationally "creating causes" or explanations of that which it observes, and that it cannot be otherwise.

Quite interestingly then he briefly scans geometry, mechanics, physics and chemistry, demonstrating how the reasoning machine has acted in the creation of these sciences; that men do not discover causes; that in fact, they merely create, by the use of the mind material, that is, images in the form of words, causes which when created satisfy all of the reality which observation has disclosed.

Having established that the physical sciences, while based upon observed phenomena, are as to their rational branches no more real than the mind which has done the rationalization, he proceeds to a study of the social sciences, prefacing that study with the oft-repeated iteration of the essential oneness of all the sciences, social and physical. "There is not one science, but sciences, all using the same instrument under one of its two forms, formal logic or analysis." It is here that for the lawyer the book reaches its high ground.

To those lawyers and judges who through good and ill repute have boldly declared and as boldly maintained that since law serves life it must be so integrated with it as to constantly adapt and conform itself to the life it serves, and that only when the law of "Is" and the law of "Ought to be" are one and the same is it well with the law, this part of the book comes as a promise to the hope, and a challenge to new endeavor.

For in his brilliant and convincing way the author here makes clear that not logic, but life, the entire life of the universe, makes our laws, and that only as laws keep touch with life is their existence justified.

The following sentences from his book, pieced together to make a connected whole, serve better than I can do to make his point. "It is life that in its course determines each stopping point, that implies its appropriate laws."

"The rules of practical morals are universal and necessary, but are so only for and through ourselves. They are the product of the education received, of the principles adopted, of the present social state, and of all those which preceded it. They are the product of life. . . . Ethics can no more be conceived as detached from political and social history than from economics or food conditions, from climate or from the fertility of the soil."

"The first man probably had no more idea of duty than of causality. He lived—and that is the key to our history. He lived, and life made him what we are. By what process of evolution, by means of what intuition followed by what unconscious experiences, repeated indefinitely, he arrived

at the notion of duty and of right, is something we can only imagine."

"Thus the rules of ethics cannot be conceived as isolated from and independent of, the entire life of our universe. They are its result, its inevitable outcome. They have no absolute meaning."

"As for the cause determining those changes, we have described it in the preceding chapter. It is the total life of the universe. It constructs and it remodels without end. All around us we feel life evolving, new conditions coming about, laws asserting themselves."

"Thus is explained the fact that nations have always had that system of morals which justifies their current rules of life. Moral theories no more make customs than do our ideas about the constitution of matter make the properties of bodies. Both the former and the latter are created for the sole purpose of explaining a system of appearances which is given to us."

"We can now understand the futility of efforts to justify the existing social state by rational theories. Moral or economic theories no more determine the form of our society than the kinetic theory determines the properties of gases. The social state exists, brought about by the total life of our universe and our theories were created only a posteriori to re-discover its laws."

"The fundamental part of all social sciences will be the search for empirical laws. The materials at our disposal to facilitate this quest are history, statistics and average prices of all sorts. Their study, systematically conducted, alone can lead to the discovery of new laws or to the verification of rational laws supposed to be true.

"We are persuaded that systematically adopting these points of view would lead to immense progress in all of the social sciences, whose existence and nature they make clear, and that such progress would put into our hands a power comparable to that given us by modern physics."

"Thus is the nature of our explanation made clear. Life moves along. It brings into play innumerable forces confronting us on all sides. In the immense crucible which our universe is, life is at each instant forging the reality of the moment. We, far behind, follow painfully and slowly."

"We discover laws explaining characteristics of this reality when they can be enunciated. We make out of them for ourselves only an explanation which rationally justifies their existence. We create the causes of these laws, in the logical sense of the word."

"Thus life pursues its way, and the savant has constantly to make the infinite variety of things 'thinkable' by creating causes."

And so the book ends, maintaining in the ending, as in the beginning, that this mind with which we are endowed while unable to control the appearance of phenomena, being compelled to receive them as they record themselves, is yet able to and does create the laws which justify and explain these phenomena so completely as that at any given time the laws which we accept as true in the physical and in the social sciences are merely those rationalizations which our minds have established to make life thinkable and therefore livable, and thus Wisdom is again justified of her children.

Thus it is that a book written not by nor for the lawyer, expressed not in legal terms, written by one having no legal axe to grind, no legal preconceptions to declare or establish, gives vigorous and authoritative support to the doctrine that "modification implies growth; it is the life of the law;" that creation in it is still going on, and that just as in the past judges did "create causes," so now, with minds guided and formed by experience, judges may still and will again sometimes create the law.

Nay more—the book gives reach to the mind and power to the arm of those who believe that in the social as in the physical sciences "to enunciate a fact is almost to create it entirely"; that in the social as in the physical sciences "there is in the human intellect a power of expansion, almost a power of creation, which is brought into play by the simple brooding upon facts." That in the social as in the physical sciences "the main part of intellectual education is not the acquisition of facts, but learning how to make facts live."

That in the social as in the physical sciences "facts are sterile, until there are minds capable of choosing between them, and discerning those which conceal something, and recognizing that which is concealed. Minds which under the bare fact see the soul of the fact." That in the social, as in the physical sciences, "experiments must be made significant by the flash of a luminous hypothesis"; that learning is indeed necessary, but learning is the springboard by which imagination leaps to truth.

That just as in the physical sciences sometimes upon the explorer whose mind imagination has made luminous light breaks when the path is darkest to his feet, and he finds himself transported through locked doors, past barriers to full discovery, so in the social sciences if he will but let his mind be bold, will but let it range in ever-widening circles to find a fresh scent, instead of standing baying where the cold track was lost, there will sometimes come to the lawmaker, whether legislative or judicial, when after long and laborious study he is seeing most as through a glass darkly, that blinding flash of intuitive understanding which will permit him to see and to create that which ought to be, which will be, which is the law.

So it is that the lawyer reading Rueff's book rises from the reading of it with a fuller sense of the exquisite beauty and the proven wisdom of that philosophy which looks upon the law as truly a great stream of justice serving man, with an eddy here, a ripple there, indeed made by bad precedent, legislative or judicial, and fed from many springs, yet ever flowing in its main stream broadly down toward the wide sea of perfect truth and right, carrying and to carry on its broad bosom all the argosies which men have ever launched, or ever may launch in the quest of life, liberty, or the pursuit of happiness.

Finally, those lawyers among us who have long believed and stoutly maintained that law was made for man, and not man for law; that "an unstandardized and unscientific sense of justice is a high price to pay for liberty, but not too high," will derive from the confident proclamation of the book that it is life, the total life of our universe, and not logic which must make the law, a new sense of security.

With renewed courage they will continue to resist the threatened coming of that day when through mere

legislative fiat a complete standardization of the human species will be attempted, and with it a standardization of the sense of justice, looking confidently to life, which all around us we feel evolving, to continue to release forces and set in motion agencies to make the law ever increasingly less rigidly standardized, more responsively humanistic, and therefore the social order in which it operates less mechanized, less standardized, less hopelessly despairing.

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1. Note: The fifteenth chapter, a rather lengthy technical exposition of mathematical-political economy, contains little of interest to the lawyer and this review has definitely excluded it from consideration.

Leading Articles in Current Legal Periodicals

Illinois Law Review, January (Chicago)—Territorial Extent of Trade-Mark Rights and the Partial Sale of a Business, by Bertram F. Willcox; Legal Fictions, by Lon F. Fuller.

Michigan Law Review, January (Ann Arbor, Mich.)—Conflict of Laws Treatment of Interpretation and Construction of Deeds in Reference to Covenants, by Raymond J. Heilman; Changing Factors of Reasonable Rates, by Clarence M. Updegraff; Jurisdiction for the Purpose of Imposing Inheritance Taxes, by David R. Mason.

Law Notes, January (Northport, N. Y.)—Legislative Investigation, by B. Thorn Lord; Insurance: "Accidental" Death in Pursuit of Criminal, by Andrew C. McIntosh; Criticism of Decision or Opinion, of Case Then Terminated, as Contempt, by Carl V. Venters.

Georgetown Law Journal, January (Washington, D. C.)—Tort Claims Against the United States, by O. R. McGuire; Judicial Review of the Motives of City Councils, by Charles M. Kneier; The Origin of Equity, Part VI, by Charles A. Keigwin; Criminal and Non-Criminal Attempts, Part I, by John W. Curran.

Air Law Review, January (New York City)—The Juridical Congress on Wireless Telegraphy at Liége, by John W. Guider; The Doctrine of Res Ipsa Loquitur as Applied to Aviation, by Howard Osterhout; The Legal Relation Between Aviation and Admiralty, by Van Vechter Veeder; Does the Havana Aerial Convention Fulfill a Need? by Louis C. Cassidy; Use of Aircraft During Martial Law, by Rowland W. Fixel.

Harvard Law Review, January (Cambridge, Mass.)—The International Unification of Laws Concerning Bills of Exchange, by Manley O. Hudson and A. H. Feller; Extinguishment of Contingent Future Interests by Decree and Without Compensation, by Merrill Isaac Schnebly; Fractional Shares Under Stock Dividend Declarations, by William C. Waring, Jr.

Boston University, January (Boston)—The General Court of Massachusetts, by Arthur P. Rugg; Constructive Trusts and the Statutes of Frauds and Wills, by Frank L. Simpson; The Selective Draft Cases—A Judicial Milepost on the Road to Absolutism, by Forrest Revere Black; The Massachusetts Proposals for Public Control, by Lewis Goldberg; Motor Carrier Questions in the Lower Federal Courts, by John J. George.

Minnesota Law Review, January (Minneapolis, Minn.)—Under the Lien Theory of Mortgages Is the Mortgage Only a Power of Sale? by Bernard C. Gavit; Has the Conflict of Laws Become a Branch of Constitutional Law? by G. W. C. Ross; The Taxation of Indian Property, by Robert C. Brown.

St. John's Law Review, December (Brooklyn, N. Y.)—Notes on the New York Rule Against Suspension of the Power of Alienation, by Maurice Finkelstein; Summary Procedure Against Transferees of Assets Under the Revenue Acts of 1926 and 1928, by Benjamin Harrow; Judicial Interpretation of Physical Capacity to Marry, by Philip Wittenberg; The Fiduciary of the Future, by Murray L. Jacobs, Edmond N. Cahn; The Supreme Law of the Land (An Address), by Hon. Frederick E. Crane.

Temple Law Quarterly, January (Philadelphia)—The Development of International Air Law to 1919, by William M. Gibson; Distribution of Premium Bond Interest Between Life Tenant and Remainderman, by L. L. Briggs; Water Rights in United States-Mexico Streams, by Wallace Hawkins; Open Price Arrangements in the Sale of Goods, by L. Vold; Four Modern Philosophies and Their Application to Law, by Mark M. Litchman; Freedom of Interstate Trade Under the Australian Constitution, by Basil A. Helmore; The Chinese Court System, by Roy M. Lockenhour; Possession in Jewish Law (II), by Isaac Herzog.

American Journal of Police Science, November-December (Chicago)—Ballistics as Applied to Police Science, by Captain Seth Wiard; The Identification of Gems and Precious Stones, by R. C. Emmons; Military Firearms Adapted by Criminals to Suit Their Purposes, by N. Suskin; Criminalistic Technique in the Treatment of Finger and Palm Print Traces and Their Value as Circumstantial Evidence (Part III), by Ferdinand Watzek.

Yale Law Journal, January (New Haven, Conn.)—Legal Duties, by Carleton Kemp Allen; Legal and Institutional Methods Applied to the Debiting of Direct Discounts—1. Legal Method: Banker's Set-Off, by Underhill Moore and Gilbert Sussman; The Conflict of Laws of Germany—Contracts, by Ernest G. Lorenzen.

American Journal of International Law, January (Washington, D. C.)—The Ninth Year of the Permanent Court of International Justice, by Manley O. Hudson; Violations of Maritime Law by the Allied Powers During the World War, by James Gilford Garner; Suits Against Foreign States, by Jasper Y. Brinton; Foreign Bondholders and the Repudiated Debts of the Southern States, by Bessie C. Randolph; Procedure in Cases Involving Immunity of Foreign States in Courts of the United States, by A. H. Feller.

The Journal of Air Law, January (Chicago)—A Survey of International Aviation, by Kenneth W. Colegrove; The Seadrome and International Law, by Rowland W. Fixel; Regional Aviation Conferences, by A. T. Stewart; State Regulation of Radio, by Col. Thad H. Brown; The Liége Congress of the International Committee on Wireless Telegraphy, by John W. Guider.

Virginia Law Review, January (University, Va.)—The Drama of English Procedure, by Thomas W. Shelton; Trying Criminal Cases Without Juries in Maryland, by Eli Frank; Garnishment of Dividends in Bankruptcy Proceedings, by Leon Goodman.

Mississippi Law Journal, February (University, Miss.)—A New Legal Classification in Mississippi Jurisprudence, by William H. Watkins; Tort Liability of Insurance Companies, by R. C. Stovall; Guaranty of Bank Deposits in Eight States, by A. B. Butts; The Rising Tide of Advocates, by Will Shaffroth; The Life of Judge J. A. P. Campbell, by W. J. Pack.

Canadian Bar Review, January (Toronto)—The Legal Status in British Columbia of Residents of Oriental Race and Their Descendants, by H. F. Angus; Some Differences Between the Common Law and That of the Province of Quebec, by F. J. Laverty; Last Judge of the Old Far West, by Lionel Westover.

University of Pennsylvania Law Review, February (Philadelphia)—Problems of Construction Arising in the Law of Property—Particularly in the Law of Future Interests, by Reynolds D. Brown; Legal Education and the Law-School Curriculum, by John Dickinson; The Doctrine of Estoppel Applied to the Statute of Frauds, by Lionel Morgan Summers.

University of Cincinnati Law Review, January (Cincinnati)—Investment of Trust Funds, by Samuel Freifield; Taxation of Foreign Corporations, by Ralph A. Colbert, John S. Pyke.

LAY ENCROACHMENTS

No Solution of Problem Will Be Comprehensive or Permanent That Does Not Take Into Consideration the Interests and Needs of the Public and Its Demand for Satisfactory Service—Administration of Justice Primarily the Profession's Responsibility —Value of Cooperation With Other Agencies in Settling Differences*

By Charles A. Beardsley
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MY subject is lay encroachments. I have chosen this subject, not only because it includes within its scope the unlawful practice of the law, in which subject the members of the bar are very much interested, but also because it involves considerations that will permit me to mention other State Bar problems and activities.

The law incroachment problem is not a new problem. The record does not disclose that there were any lay encroachments during the first generation of man on earth. But the fourth chapter of Genesis, which records the troubles of the second generation, discloses that Abel encroached upon Cain's favor with the Lord. And it is pretty well established, in part by direct evidence and in part by the presumption of the continuance of things, that ever since that time some one has been encroaching upon some one else.

Seeing that Cain was troubled by Abel's encroachments, the Lord said unto Cain (Genesis, fourth chapter, seventh verse)—well, what the Lord said unto Cain is the text of my remarks today. I shall not repeat it now. For those of you who know your Old Testament, such repetition will be unnecessary; and for the benefit of those of you who do not know it, if there be any such present, I shall try to remember to repeat it before I take my seat.

The solution of the lay encroachment problem requires clear thinking and careful analysis. In an address given at the annual meeting of the California Bar Association in San Francisco in 1915, the late Maurice T. Dooling referred to the desirability of being "able to think without perspiring." Thinking "without perspiring" is a prerequisite to a solution of the lay encroachment problem. It will not suffice that we should become agitated about it.

The solution is not a mere matter of law enforcement, because lay encroachments may be lawful as well as unlawful. And the lawful lay encroachments are much more effective and detrimental to the bar than are those that are unlawful.

Twenty-five years ago in California it was practicing law to pass upon the title to real estate. Now the public is being served in that field by laymen. This is a lawful lay encroachment.

Twenty years ago all industrial accident litigation was handled by attorneys. But the people amended the Constitution and enacted legislation so as to turn all of that practice over to laymen and lay commissions. Here, also, is a lawful lay encroachment.

Today, in many quarters, there are insistent demands that all automobile accident litigation be taken out of the courts and away from juries and attorneys and turned over to laymen and lay commissions. This is a demand for another lawful lay encroachment.

Today there is a rapid increase in the use of arbitration agreements. Whole industries, and large and important ones at that, insist upon arbitration clauses in all their contracts. In these clauses they say, in effect, that, if the parties have any controversy, it will not be settled by attorneys in the courts—in the instrumentality in which attorneys have the exclusive right to operate—it will be settled in a common sense, expeditious and business-like way, by laymen.

The existence of lawful lay encroachments, and of proposals for other lawful lay encroachments, demonstrate that the solution of the problem is something more than a problem of law enforcement.

It is not merely a matter of law enforcement, further, because the law is not permanent; it is changeable and changing. The legal profession exists for the benefit of the public; it exists subject to the public will. Our rights were given to us for the benefit of the public, and they may be retained by us only so long as the public wishes us to retain them. What is lawfully ours today, tomorrow will lawfully belong to someone else, if the public so decrees. The public can take other rights away from us, just as it took away the exclusive right to pass upon titles and the right to handle industrial accident litigation, and just as it threatens to take away all automobile accident litigation.

As was well said in a recent editorial in the Los Angeles Times: "There is no such thing as a right to practice law; it is a revocable privilege, granted in trust."

We hold our rights as trustees, under a revocable trust. The public is the trustor and also the beneficiary.

Because lay encroachments in the past have been made lawful, and because in the future more lay encroachments may be made lawful, unless the causes are removed, the solution of the lay encroachment problems is not a mere matter of law enforcement.

Nor is it merely a matter of stamping out competition. The public, at whose pleasure we hold our exclusive rights, is but little, if at all, concerned about who is competing with us. The pub-

*Presidential address at annual meeting of State Bar of California at Pasadena, Sept. 18, 1930.

lic would probably reason that if we had more competition we would render better service. The State Bar is not a labor union, organized as a weapon to be used by the eleven thousand members of the bar in combating the other five and a half million people in the state. It exists primarily for the benefit of the public; and it must justify its existence by its service to the public, not by its success in combating the public.

No solution of the problem of law encroachments will be comprehensive or permanent that does not take into consideration the interests and needs of the public, and the demand of the public for satisfactory service. The public is a party to every lay encroachment, both lawful and unlawful. It is a matter of purchase and sale of service, and the public is the purchaser. No solution will be effective that overlooks the fact that, in the long run, the public will purchase the service in any particular field from those who sell the best service, whether they be attorneys or laymen.

Satisfactory service produces a demand for that service, and unsatisfactory service reduces the demand. Unsatisfactory legal services were largely responsible for the title company encroachment and the industrial accident encroachment. They are largely responsible for the present demand for automobile accident encroachment. They are largely responsible for arbitration agreement encroachments. And they are largely responsible for unlawful encroachments as well. If the public were thoroughly satisfied with attorneys' services, it would not accept laymen's services as a substitute.

Unsatisfactory service in the past has fostered, if it has not actually produced, lay encroachments. And we have no reason to believe that unsatisfactory service, if persisted in, will not continue to foster or produce lay encroachments. A reduction in the quality of the service will not result in an increased demand. We cannot stop feeding the cow and expect her to give more milk.

Of course, I realize that there is much in the service of the bar that is worthy of the highest praise—such as adherence to strict codes of ethics, devotion to the interests of clients, free service to the poor and generous public service. It is pleasing to dwell upon such things. But improvement only comes as a result of a recognition of the need for improvement.

How can we improve the service of the bar, so that it will be more satisfactory to the public, so that it will be more in demand, so that the lay substitutes, when compared with what we have to offer, will look less attractive to the public?

One thing that is deserving of our painstaking attention is the improvement of the administration of justice.

In an address at the recent meeting of the American Bar Association in Chicago, Mr. Chief Justice Hughes said: "We do not blink at the fact that the greatest need in this country today is the improvement of the administration of justice."

The administration of justice is the instrumentality through which we serve the public.

It is unsatisfactory to the public. It is unattractive. Ordinarily, the public would prefer not to use it at all. Ordinarily, the public purchases it only at forced sale. It is cumbersome and uncertain. It is slow.

The administration of justice has experienced no substantial improvement in many generations. Lord Coke died 296 years ago; but if he went into the Superior Court in this county today, he would feel very much at home. He might not know what size paper he must use for his pleadings, or whether the pages or the lines need be numbered; but outside of such minor details, he would fit very readily into the practice of the law today.

But if he should leave the court house, and see an automobile parked at the curb, he would not know which end to hitch the ox team to. And it would be much the same with every other instrumentality that serves our complex modern life; all would be new and unfamiliar to him—all except the administration of justice.

The administration of justice is primarily our responsibility. We use it; we operate it; our pride and our sense of duty to the public should keep us ever alert to improve it.

We have an exclusive franchise from the state to operate the administration of justice. Our self-interest, as well as our pride and our sense of duty, demands that we do everything possible to improve it, to make it serve our clients better, to make it less unattractive to them. Suppose, instead of having an exclusive franchise to operate the instrumentality known as the administration of justice, we had an exclusive franchise for a bus line between Los Angeles and San Francisco. Suppose this franchise was granted to us twenty-five years ago, when they were making those fine up-to-date two-cylinder automobiles, and at that time we purchased a fleet of two-cylinder buses. If we continued to operate them today, no one would ride with us who could procure any other means of transportation.

The principal commodity that we are offering for sale to the consuming public is a ride in the administration of justice, a vehicle that is in such bad condition that its need for improvement is generally recognized to be the greatest need before the American people. What could be more natural than that no one would ride with us who can procure any other means of transportation?

Why should this instrumentality not be made attractive to the public? Why should it not be altered and improved so that people would prefer to use it? A comprehensive and permanent improvement of the administration of justice would make our services, rendered through that instrumentality, more attractive, and more in demand, and would go a long way toward solving the lay encroachment problem.

The State Bar Act provides that the Board of Governors shall aid in the improvement of the administration of justice. The State Bar is giving attention to this problem. We have appointed a committee of five practicing attorneys who meet and cooperate with the Judicial Council. We have organized sections throughout the state for the purpose of mobilizing the intellectual resources of the legal profession, and of directing our forces toward the improvement of the administration of justice. During the past year we have worked out a plan for an additional aid to such improvement,

which plan will be explained in detail this afternoon in the report of the Section Committee.

A change in the laws is not the only remedy for lay encroachments, to which the bar may well direct its attention. We prefer to talk about that, because we prefer to point to the shortcomings of others, rather than to those that are our own. Notwithstanding our reticence in this regard, there is much to support the charge that the laws are more progressive than are the lawyers. Delays in court proceedings, dilatory tactics and judicial inefficiency, are all delays, tactics and inefficiency, not of laws, but of the legal profession.

We are apt to be antiquated in our methods. We use forms as a substitute for clear thinking. And we are particularly fond of adjudicated forms. An adjudicated form is a form that has attached to it a certificate that there is something wrong with it. If there were nothing wrong with it, it would not have been necessary to have it adjudicated.

We are inclined to use three or more words to express a meaning that could better be expressed in one word. In commenting upon our recent proposal to eliminate the requirement for written opinions, the Brawley News said, editorially: "From a laymen's standpoint, a simplification of the phraseology would simplify the whole matter. For instance, if a merchant, a doctor or a manufacturer desires to describe this community, he will say 'Brawley, California.' If an attorney has the same thing in mind, he will describe it thusly: 'The City of Brawley, in the County of Imperial, in the State of California, in the United States of America.'"

We "give, bequeath and devise," and "let, release and remise, all those certain lots, pieces or parcels of land situated, lying and being, located, bounded and particularly described, as follows, to-wit." And we rarely forget the "to-wit." It is all a waste of fuel. If the old two-cylinder buses wasted fuel that way, we would have the carbureters adjusted. There is no reason why, in preparing legal documents, attorneys should not use ordinary, understandable, American language.

If we would improve the quality of our service, that improvement, like the improvement of the administration of justice, would result in there being more demand for our service, and would aid in solving the lay encroachment problem.

No consideration of the obstacles that sometimes stand in the way of a better administration of justice would be complete, if it were confined to a consideration of antiquated laws and unprogressive attorneys. All of the unprogressive members of the legal profession are not members of the bar. Sometimes some judges cling to antiquated ideas and to antiquated procedure. Sometimes they are inclined to construe the improvements of the present as being controlled by the mistakes of the past.

Another thing that will tend to improve the service that the bar renders to the public, and that will tend to make the public better satisfied with that service, is the raising of the standards for admission to the bar. A well-trained and adequately educated bar will give better service than a poorly trained and slightly educated bar.

The Committee on Amendments to section 24 will recommend to this convention that it approve an amendment that will provide a general educational standard. There is none in force at this time. The committee does not recommend a high standard; it recommends a requirement for a high school graduation or an equivalent of intellectual competency and achievement.

That is the standard fixed by California statutes for midwives and embalmers. It is the standard, in effect, fixed in this state, by our compulsory school attendance laws for the client of tomorrow. If the attorney of tomorrow is to expect the clients of tomorrow to look to him for advice, for guidance and for leadership, he must have at least as much education as has his client. Mr. Josiah Marvel, the new president of the American Bar Association, told this story at the recent Chicago meeting of the Conference of Bar Association Delegates. Seeing an old colored acquaintance with a well-trained dog, Mr. Marvel said to him: "Mose, how do you do it? I am fond of dogs, too, and I always wanted to train one; but I never was able to teach a dog anything. Why is it that you can train a dog so well, and I cannot train one at all?" "Well, Massah Joe," said Mr. Marvel's colored friend, "the first requirement in dog training is that you has got to know more than the dog."

The problem presented by lay encroachments, both lawful and unlawful, will be most readily solved if we improve the service that we render to the public. The public will be served, in any particular field, by those who serve it best, be they attorneys or laymen.

I do not wish to be understood as advocating that we should not ascertain our rights and assert them. We should do both. But we must realize that we cannot successfully assert them, except to the extent that we have public support.

A bar that gives the public satisfactory service will have more public support than one that gives unsatisfactory service.

In addition to rendering satisfactory service the bar must have the respect of the public, if it is to have a full measure of public support. We lost the Sample bill election by a large margin largely because we did not have sufficient public respect.

When President Hoover appointed Dean Pound and nine other members of the legal profession on the Law Enforcement Commission, Will Rogers wrote: "Hoover appoints ten lawyers and one woman to see if anybody is drinking and why. . . . Well, it is up to the lone woman to do something. I can think of nothing that the people would have less confidence in than ten lawyers put together. It looks as if he would have appointed one fellow with just horse sense."

It has been well said that there is no way of gaining more respect except by deserving more respect.

In a recent editorial, the San Francisco Call-Bulletin said: "The lay mind . . . respects the legal profession only as the legal profession deserves respect, and cleans its own house of its dishonest elements. The healthiest sign that the legal profession, as a whole, is sound is the increasing activity of bar associations against shyster lawyers and shyster judges. . . Only when the bench and bar refuse to wash their dirty linen in public will the public be suspicious of them, and it will have reason to be suspicious then."

During the last three years more has been accomplished under the leadership of The State Bar, in making the bar respected by the elimination of

the morally unfit and otherwise, than had been accomplished in the prior seventy-seven years of the history of the state.

The extent to which The State Bar is gaining for the bar of California the respect of the public is indicated by the attitude of the lay press. The press has been not only extremely liberal in the publication of State Bar news, but also in editorial comment. . . .

These editorials, and many others that have been published during the last two and one-half years, indicate that the bar of California has made substantial strides in gaining the respect of the public.

Today a respected California bar is giving its attention to the unlawful practice problem. It is ascertaining its rights, and it proposes to assert them. It is carefully analyzing all phases of the problem. It is carefully and clearly defining what is lawful and ethical and what is unlawful or unethical. In so doing it must be fair to the laymen and lay organizations whose activities it investigates, and it must be fair to the public as a whole. It must thoroughly understand, not only its own rights, but those of these laymen and of the public as well, before it can successfully assert its own rights. And, in asserting its rights, it will probably find that it can gain more by fairness, by cooperation, by argument and persuasion, than it can by unthinking controversy.

Our unlawful practice activities are being well received. Various newspaper editorials have commended our attitude as evidencing fairness. They have referred to it as "expressing the viewpoint of the public" and as "the right idea," and have said that the matter is presented so "fairly" that "there will be a solution that will be satisfactory to everyone, for fair-minded people never fail to get somewhere when they set out upon a task."

The press of the state has further evidenced its friendly attitude recently by requesting, through the California Newspaper Publishers' Association, the appointment of a State Bar committee to meet with a like committee from the California Newspaper Publishers' Association, in order that the two committees may aid in securing a fuller degree of cooperation between the bar and the press.

The bankers, the title men and others whose activities have been investigated, have expressed a willingness to cooperate in solving our mutual problems. They are simply waiting for the bar to announce a definite bar policy.

The attitude of the laymen that are being investigated is well illustrated by the resolution passed at the recent annual meeting of the California Association of Mercantile Agencies, which is the collection agents' association. The resolution resolved that the collection agents "are wholly in sympathy with the aims and objects of The State Bar of California, especially because they are designed to promote closer and friendlier relationship between the members of The State Bar and the general public, and to protect the public against unethical and unfair practices"; they resolved their policy to be to cooperate "with the members of The State Bar . . . always in an ethical and straightforward manner"; they pledged "themselves to conduct their business in strict accordance with existing laws, and with due regard to the proprieties of this line of work in its relation to the public and to the members of The State Bar and to the members of" their own association; and then they resolved that authenticated copies of the resolution be sent to the representatives of The State Bar "in grateful appreciation of their friendliness and spirit of cooperation heretofore shown to the members of this association."

The State Bar can gain more respect by cooperation than it can by controversy. You can catch more flies with honey than you can with vinegar.

It is in this spirit that The State Bar's special committees have approached the problem.

I am aware that there are some who object to this method of approaching the problem. They think that the members of the Board of Governors should spend their time arresting the bankers, title men, real estate brokers, notaries, collection agents, corporation organizers and the members of the automobile clubs and associations. It is not clear just what they expect us to do with them after we arrest them. I have yet to find a district attorney who thinks he could get a jury of twelve laymen to convict another layman of a misdemeanor because he does the things of which we complain. I first tried the district attorneys in the larger cities. They thought it could not be done in the larger cities, but said that perhaps it could be done in the country towns. So I tried in the country towns, but with no better success. The last one I talked to was up in Del Norte County. There were six attorneys in the county and three of them were running for district attorney. I asked the district attorney if he thought he could get a jury of twelve laymen to convict a real estate broker who drew a deed or a chattel mortgage. He replied that he knew that he could not and that he certainly was not going to try while he was running for office.

Some members of the bar seem to figure that the problem will be solved by talking straight from the shoulder to the laymen who are encroaching upon us. We have heard some straight-from-the-shoulder talks upon this subject during the past year. In the words of Mr. Dooley, "the air has been full of fight, and the fight has been full of air."

A San Francisco News editorial quoted an advertisement in reference to a certain lecturer; the advertisement said that the lecturer "talks straight from the shoulder." And the editorial went on to say that it was "too bad that some of these talks could not originate a little higher up."

Dean Pound told a story in Washington last May about an attorney who, when he was arguing a case, was inclined to talk very loud and to make very extravagant statements. One day a judge before whom he was arguing a case stopped him in the midst of his argument and inquired if it were not a fact that sometimes in his arguments he made statements that were not true. The attorney replied: "Your honor, I will have to admit that sometimes in the heat of argument I make statements which, upon mature deliberation, I would be inclined to modify, and even to withdraw; but, when I holler, it's the law."

The unlawful practice problem can be best solved by clear thinking, careful analysis, clear definitions of what is lawful and what unlawful, by fairness and by persuasion. It will be time enough

to "talk straight from the shoulder" to, and to "holler" at, those who refuse to listen to reason.

And the attitude of the purchasing public toward us and toward the service that we render will be the controlling factor in a solution of the problem of lay encroachments, both unlawful and lawful. We should remember that the public will purchase its service in any particular field from those who serve it best, whether they are attorneys or laymen. We can accomplish most by making the bar more worthy of respect, and more respected by improving our service so that the public will be more anxious to avail itself of our service; by improving the administration of justice, by raising the standards of those admitted to the bar, by serving the public better.

Seeing that Cain was troubled by Abel's encroachments upon Cain's favor with the Lord, the Lord did not say unto Cain, you should slay Abel, or you should have him arrested, or you should talk straight from the shoulder to him, or you should holler at him. The Lord said unto Cain (Genesis, fourth chapter, seventh verse): "If thou dost well, shalt thou not be accepted?"

FUNDAMENTAL PRINCIPLES GOVERNING INTERNATIONAL CLAIMS

Duties of Alien Toward State and of State Toward Alien — Nationality and Complex Questions That Arise Under This Head—Exhaustion of Remedies and Denial of Justice—Work of State Department in This Important Field—Hundreds of Claims Disposed of Annually by Rejection or Settlement Through Negotiation or Arbitration*

By Green H. Hackworth
Solicitor of the Department of State

INTERNATIONAL claims are not new phenomena in international affairs. They have been a subject of concern to States since the beginning of international intercourse. They are settled, in peace times, by one of two methods, namely, by direct negotiation, usually through diplomatic channels, or by arbitration. History records that a form of arbitration was resorted to as far back as the fourth century, when differences between the City States of Greece and complaints against those States were heard by the Amphictyonic Council sitting judicially. Thus, for instance, the lack of proper treatment on the part of a Greek City State of a neighboring village, whose citizens were deprived unceremoniously of their property, was a subject referred to arbitration.

Claims have constituted an important part of the work of the Department of State since the beginning of the Government. By an Act of Congress, approved August 12, 1848, provision was made for a clerk in the Department of State with a salary of $2,000 per annum, to be assigned to the duty of examining claims presented to the Department in behalf of American citizens against foreign Governments, and by an Act approved July 25, 1866, the office of Examiner of Claims, with an annual salary of $3,500, was created. The office was abolished by the Act of July 30, 1868, and was reestablished by the Act of May 27, 1870. When the Department of Justice was organized under the Act of June 22, 1870, the office of Examiner of Claims was transferred to its nominal jurisdiction, but the nature of the duties remained undisturbed. By an Act of March 3, 1891, the title was changed to Solicitor of the Department of State. By this Act the Solicitor became the law officer of the Department with the duty of rendering opinions upon questions of law and continuing the supervision of all claims matters.

Today, the Solicitor's Office has a staff of 22 lawyers, specially trained in the field of international law, 9 of whom devote their entire time to the consideration of international claims and constitute what we are pleased to call the Claims Section of the Solicitor's Office.

"What," someone not familiar with the subject may ask, "are international claims, and how do they arise?" An international claim is one which is advanced by one State (speaking of States in the technical or international sense) against another.

A claim may result from any one of a myriad of situations in which the claimant may find himself in a foreign country. The right of his State to intervene in his behalf must, however, be based upon some act or omission of the defendant State amounting to an international delinquency.

To undertake to give more than an outline of the fundamental principles of the law of claims would burden you with an amount of unnecessary detail. It is important to bear in mind, however, that the alien and the foreign State in whose jurisdiction he is owe to each other certain correlative duties —the alien the duty of good behavior and obedience to the local law, and the State the duty of affording protection and an opportunity to adjust his grievances.

Every State that has been recognized as a member of the community of nations is presumed to extend protection to the life, liberty and property

*Address delivered at a meeting of the Federal Bar Association, Washington, D. C., on Dec. 17, 1930.

of all people within its borders, whether they be nationals or aliens. If it fails in this duty toward an alien, responsibility is incurred toward the State of which the alien is a national, and international law authorizes the latter to exact reparation for the injury sustained by the alien.

Duty of the Alien

We have said that an alien residing in a country owes certain duties to the State, and the State on its part owes certain duties to the alien. The alien is supposed to accept the laws and institutions which the residents of the country find suitable to themselves, and by becoming a resident he tacitly undertakes the obligation of obedience to the law and assumes a relationship toward the State of his residence, generally referred to by writers as "temporary allegiance." If the alien receives the benefits of the same laws, protection and means of redress for injuries which the State accords to its own nationals, the State of the alien has no just grounds for complaint unless it be shown that the system of law, its administration, and the protection accorded fail to meet the standard generally recognized as essential by the community of nations. This standard of civilized justice, as it has sometimes been called, may be said to be measured by the general practice of the more advanced States. Diplomatic interposition in behalf of a national because the law and procedure of a foreign country in which he resides are different from those of the protecting State obviously is not justifiable unless it be shown that the application of the law in a given case falls short of the standard of justice which may reasonably be expected in an enlightened civilized State admitted to membership in the family of nations.

Duties of the State

The duties of a State toward aliens within its jurisdiction and toward foreign States may be briefly stated as follows:

(1) To maintain a governmental organization adequate under normal conditions for the performance of its "international obligations."

The term "international obligations," as tentatively defined by the Committee on Responsibility of States at the recent Hague Conference on Condification of International Law, means those obligations resulting from treaties, custom, and the general principles of law.

(2) To afford aliens means of redress for injuries, which must be not less adequate than those afforded nationals of the country.

A State is responsible under international law if damage is sustained by a foreigner as a result of an act or omission on the part of any of its governmental organs incompatible with its international obligations. It is responsible for acts or omissions of its officials within the scope of their authority, if such acts or omissions contravene the international obligations of the State.

The State may also be responsible for the acts of individuals, insurgents, and mobs, if it has failed to take such measures as might reasonably have been expected under the circumstances to prevent the injury, or to give redress, or inflict punishment for the damages. The test, in other words, is one of due diligence.

The question as to whether intervention is justified in any particular case must of necessity depend upon the facts of that case. Definite rules to cover every case, except of a very general character, can not be laid down.

Nationality

However, the first essential of any diplomatic claim is proof that the claimant is a person entitled to the protection of his Government. The general rule is that claims must be national in character from the date of origin to the date of presentation to the foreign Government. A break in the national ownership, as by assignment or change in nationality of the claimant or his successors in interest, is generally regarded as defeating the claim.

Very complex questions of citizenship are often presented, as will be illustrated by a case now pending before the Department, the complications of which will readily be appreciated especially by those of you who have had occasion to consider the application of our laws on naturalization and expatriation. I have in mind particularly Section 2 of the Act of 1907, under which the presumption of expatriation arises against a naturalized citizen after certain fixed periods of residence outside the United States, and provisions of the several Acts with respect to the citizenship of married women. For example, by one of the early statutes, later embodied in Section 1994 of the Revised Statutes, it was provided that any alien woman who married a citizen of the United States and who might herself be lawfully naturalized should be deemed a citizen.

Section 4 of the Act of 1907 provided that any foreign woman who thus acquired American citizenship might retain it on the termination of her matrimonial relation, if residing abroad, by registering as a citizen before an American Consul within one year.

Section 3 of the Act of 1907 provided that any American woman who married a foreigner should take the nationality of her husband. These several provisions of law, being distasteful to our women, were, at their instance, repealed by an Act regarding the naturalization and citizenship of married women, approved September 22, 1922, but it was specifically stated in this latter Act that such repeal should not affect citizenship acquired or citizenship lost under those earlier provisions. Many women had either acquired or lost American citizenship by marriage under these earlier statutes. The 1922 Act further provided that any woman who before the passage of the Act had lost her American citizenship by reason of her marriage to an alien might regain it by naturalization in her own right. The law was further liberalized by an Act approved July 3, 1930, which makes the re-acquisition of citizenship by such women a comparatively simple matter.

We now have before us in the Department of State a claim by a woman who became naturalized under the early statute by marriage to a naturalized citizen. Shortly after the marriage, she and her husband took up their residence in the foreign country of which they were both natives. Their continued residence in that country brought upon

them the presumption of expatriation under the Act of 1907. Early in 1916, the husband died. The wife continued to live in the foreign country, and, in addition to the fact that she was under a presumption of expatriation, she failed to take steps to retain her citizenship by registering at an American Consulate within one year following the death of her husband. Some two years later, she again married,—this time to a citizen of the country in which she was residing. This marriage brought her under the provisions of Section 3 of the Act of 1907, providing for the loss of citizenship by marriage to an alien. However, before the expiration of the year within which she should have registered at the Consulate following the death of her first husband; also at the time of her re-marriage to her present alien husband, we had entered the World War. This fact brought into operation another provision of the Act of 1907, declaring that no American citizen shall be allowed to expatriate himself while this country is at war. Her status, therefore, remained in this chaotic condition until the conclusion of peace on July 2, 1921, at which time the provisions of law regarding expatriation became operative, and she ceased to have any claim to American citizenship.

Following the passage of the Act of July 3, 1930, by which the re-acquisition of citizenship lost through marriage to an alien is granted practically for the asking, this woman came to the United States, was naturalized in one of our Federal Courts, and promptly filed a claim with the Department of State for a considerable sum of money based upon alleged destruction and confiscation of property by the Government of the country of which she is a native and within whose jurisdiction she has been residing all these years. The claim arose after her marriage to the alien husband, by which she would have been definitely expatriated except for the fact that we were at war. Immediately after her naturalization and the presentation of the claim, she returned to the foreign country, where she continues to reside, and of which her husband and possibly the claimant herself are citizens.

There are many other details which might be of interest but with which I shall not burden you since these are sufficient to indicate the entanglements on which it sometimes becomes necessary to pass before any thought whatever is given to the merits of the claim. If the nationality of a claim is established, the next step is the consideration of the facts and law of the case for the purpose of determining whether there is a just complaint.

Exhaustion of Remedies

An important point to be determined in connection with any claim is whether the claimant has exhausted the means available to him in the foreign jurisdiction for redressing his injuries. If the local law provides a method of redress, either by appeal to the local courts or to the administrative authorities, the claimant, before he is entitled to have his case espoused by his Government must, as a general rule, show that he has exhausted such remedies and has been unable to obtain justice. There are certain exceptions to this general rule, however, such as cases in which it is satisfactorily established that:

(1) Justice in the local courts is wholly lacking;

(2) The injury was caused by the arbitrary and unjust action of the higher officials of the foreign Government, and there appears to be no adequate ground for believing that a sufficient remedy is afforded by judicial proceedings;

(3) The local courts have been superseded by military or executive authorities;

(4) The local courts are menaced and controlled by a hostile mob;

(5) Local remedies are insufficient, etc.

If it develops that the claimant has a remedy or remedies of which he has not availed himself, and it does not appear that any of the recognized grounds exist which would excuse an exhaustion of such legal remedies, he is usually told that he must first resort to them and that his claim will be recognized only in case he suffers a denial of justice at the hands of the judicial or other authorities of the foreign country.

This requirement concerning local remedies is the source of much dissatisfaction on the part of claimants. A surprisingly large number of them do not seem to realize that when they go to a foreign country they submit themselves to the laws there in force, and that it is only in case of denials or miscarriage of justice, or actual injustice under those laws, that they are warranted in appealing to their own Government. In a large percentage of cases, the suggestion by the Department of State that claimants must exhaust their local remedies is countered by the statement that it is futile to appeal to the local courts because of their inability or unwillingness to do justice.

The Department, of course, can not assume that the regularly established courts of a country will not administer justice until it has been shown that such is the case. This contention is frequently advanced as a subterfuge by which claimants hope to make a short cut to diplomatic assistance in their behalf.

It is not unusual for unsuccessful litigants to feel that they have suffered a denial of justice when the courts have failed to agree with their contentions. They are more apt to feel that way if they have been unsuccessful in a foreign court. Disappointed by the outcome of their litigations and misled by erroneous conceptions of their rights to diplomatic protection, they come to the Department of State with their grievances. The fact that a litigant is dissatisfied with the decision of the court naturally does not, of itself, afford any ground for contending that the court has failed to administer justice.

What Is Denial of Justice?

A denial of justice by the courts means more than that the decision might have been different, or that reasonable men might differ as to its correctness. Opinions of arbitral commissions and authorities differ so greatly, however, that it is extremely difficult to give an abstract definition of denial of justice by the courts. One authority has recently gone so far as to say:

"Without attempting to announce a precise formula, it is in the opinion of the Commission possible to go a little further than the authors quoted, and to hold (first) that the propriety of governmental acts should be put to the test of international standards, and (second) that the treatment of an alien, in order to constitute an international delinquency, should amount to an

outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial." (Mexican Claims Decisions, 1927, p. 73.)

This is probably an extreme view of the case.

A more moderate statement is found in the 9th Article of the draft code recently prepared by the Harvard Research, Harvard Law School, which reads:

"A state is responsible if an injury to an alien results from a denial of justice. Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guaranties which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice."

The subject was considered by the Committee on Responsibility of States, at the recent Conference at The Hague, which provisionally agreed upon the following:

"International responsibility is incurred by a State if damage is sustained by a foreigner as a result of the fact:

"(1) that a judicial decision, which is not subject to appeal, is clearly incompatible with the international obligations of the State;

"(2) that, in a manner incompatible with the said obligations, the foreigner has been hindered by the judicial authorities in the exercise of his right to pursue judicial remedies or has encountered in the proceedings unjustifiable obstacles or delays implying a refusal to do justice."

Generally speaking, the basic principles involved in international claims are that nations are supposed to be equal; that, in probably 99 cases out of 100 judgments of their courts of last resort are considered to be and are accepted as just; that, therefore, there is a very strong presumption in favor of the correctness of all such judgments and consequently a claimant who bases his grievance upon an alleged denial of justice by the courts assumes the obligation of establishing by clear evidence that his case was the very unusual exception to the rule of just procedure. Speaking in a broad and non-technical sense, it may be said that if the decision in question appears to be unjust and is shown to have been influenced by improper motives, if corruption of the court is shown to have existed, or if it is proved that there was prejudice or discrimination against the alien because of his nationality, or if there was unconscionable delay by the courts, or other irregularities of established procedure resulting in injustice, or if there were other considerations showing that the court did not endeavor to give a just decision on the merits of the case, diplomatic representations are considered to be justifiable.

It so happens that in many of the cases generally classified in the above outline, the claimant has become the victim of the acts or negligence of administrative authorities under circumstances for which the local law provides no judicial remedy. In such cases, representations are justifiable without recourse to court proceedings. The circumstances of such cases, however, are so varied that it would be impossible to describe them or to indicate under what circumstances, in each class of cases, diplomatic intervention would be justified without an elaborate discussion of the subject.

International claims, as I have already observed, have constituted an important part of the work of the Department of State since the beginning of the Government. With the vast development of trade and commerce and of the facilities for travel and communication, claims have had a proportionate increase in volume and importance. Hundreds of claims, amounting to millions of dollars are considered and disposed of annually by the Department, by rejection or settlement through negotiation or arbitration. Arbitration is resorted to only (1) when agreement can not be reached through ordinary processes of diplomacy, and the claim is of sufficient importance to warrant the bringing into operation of the machinery of arbitration; or (2) when the number of claims against a particular Government to be settled is so large as to render impracticable settlement through other than the machinery of an organized tribunal with authority to hold hearings and to make final determinations on questions of law and fact. During the past three years the Department has collected from foreign Governments on behalf of American claimants approximately one and one-half million dollars. Of this amount, more than three-quarters of a million dollars were collected through negotiations with the foreign Governments concerned, and the balance was collected through arbitration. These figures do not, of course, include any of the awards of the several Claims Commissions which have been functioning in Washington, nor the awards of the Chino-American Claims Commission amounting to $887,177.57 Mex. on American claims against China.

The Department has also considered and passed upon claims presented against this Government by foreign Governments in the amount of $4,427,068.29. Some of these were disallowed. For those considered to be just, an aggregate amount of $657,290.99 has been allowed.

Review of Recent Supreme Court Decisions

(*Continued from page* 179)

include such income. It later amended it further to include "income from any source." This was thought sufficient to indicate the state's unconstitutional purpose of annulling the immunity from taxation.

In addition to this, however, the dissenting Justices thought that, apart from extrinsic circumstances, the tax was upon income, and, relying on the opinions of the New York Court of Appeals referred to in the majority opinion, in support of their view, said:

> But wholly apart from extrinsic circumstances the statute itself in terms seems clearly to impose an income tax. The tax is not one *upon* the privilege of doing business, but it is an annual tax *for* the privilege of doing business, to be computed upon the basis of the net income for the year next preceding.

MR. JUSTICE VAN DEVANTER AND MR. JUSTICE BUTLER concurred with MR. JUSTICE SUTHERLAND.

The case was argued by Messrs. Roger Hinds and Benjamin P. DeWitt for the appellants and by Mr. Wendell P. Brown for the appellees.

A UNIVERSITY VIEW OF LAW AND THE SOCIAL ORDER

Nation Is in a Condition of Flux in the Reconstruction of the Social Order Which Is Profoundly Affecting Courts and Our National Attitude Towards Legal Procedure—Need of Bringing Disinterested and Trained Intelligence to Bear on Problems —Rapprochement Between Universities and Legal Profession Is Pregnant with Fruitful Consequences*

By James Rowland Angell
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FOLLOWING a well established legal custom, I venture to furnish at the outset of my address a brief of its main features. My hearers may thus sense in a few moments the main drift of my paper and thereupon exercise their discretion as to the degree of attention they accord the elaboration of the argument.

I observe then that, while there is historic basic for the view that law derives from the tribal mores and is originally inseparable from custom, in a modern industrial society like our own it inevitably tends to outstrip custom in the effort to meet the demands for ordered adjustment in new situations, many of them lacking in any wholly pertinent precedents. In this connection I indulge in a few alarums and excursions on the subject of the lawyer who preaches disobedience to laws which he does not like.

I next remark that the traditional limitations of the law, its inevitable deference to precedent and the rules and regulations set up to ensure a certain and even-handed justice, have resulted, first, in the hopeless congestion of the courts with forms of litigation with which they are obviously ill-adapted to deal, and second, in the consequent creation of a great variety of extra-legal devices to handle more expeditiously, more intelligently and more discreetly the issues of the contemporary American world.

I further remark that, even with the relief given the courts by these extra-legal arrangements, a very large part, probably much the larger part, of their really important business concerns social, economic and political issues—in the larger Aristotelian meaning of the term. And as a corollary to this circumstance I urge the propriety of giving the young lawyer all the training that is practicable in the way of direct contact with the business, industrial and governmental problems and forms of procedures, which presently make their appearance in the halls of our legislatures and in the courts of justice.

The final inference which I would draw from the whole rehearsal is that in view of the conspicuous condition of flux which characterizes both the social order and the attitudes and practices of the courts and of legislative bodies, there is need of drastic and continuing analysis of the problems set by contemporary life, with an accompanying study of the ways in which our legal system can be best adjusted to meet these demands without the sacrifice of that stability, independence and integrity which must attach to our courts, and especially those of last resort, if society is not to deliquesce into a mere invertebrate fluid carried hither and yon by every fitful breeze of circumstance, by every current of ephemeral prejudice.

To carry on this kind of basic and continuing social and legal research is, I believe, one of the great functions our universities can fulfill, one of the great services to our national life which they can render. Indeed, in the stronger universities this is already going on, and particularly in their departments of law, economics, sociology and government. There is at this point, in my opinion, room for service of the very highest order, service which bench and bar alike will welcome and from which in turn the wayfaring man will benefit. So at least I hope it may prove to be.

I now proceed to elaborate my subject.

It is an ancient saying, but much quoted of late, that law is simply custom become self-conscious and articulate, and that no alleged law is really law which does not in this way voice general and accepted practice.

There is an historical sense in which this assertion is substantially correct. In primitive society law and social usage are not two, but one. Law is established custom and nothing else. If it be violated, the fate of the offender may be determined by the deliberations of the elders of the tribe, or it may be forthwith decided by the offended group as such. But as civilization develops and law becomes articulate and its administration becomes confided to tribunals established for the purpose, the identify of law and custom slowly begins to disappear. Not that custom ceases to be reflected in law, but that law begins to outstrip custom. Conditions suddenly arise to which no long-established custom is pertinent, and the efforts to bend old habits and traditions to fit new circumstances may work inequitably and elicit acute discontent. Forthwith new statutes appear to deal with the novel situation. In a complex industrial society like our own, this process is occurring all the time, and even though it be said with a certain plausability that all these regulations hark back to the fundamental principles of justice guaranteeing the safety of life and human liberty, the protection of

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the rights of property and the sanctity of contracts, the actual legislation in which any or all of these principles may be technically embodied may appear as something quite foreign to previous custom.

If one wishes to define law as regulation accepted by practically all as appropriate, and *binding because* enjoying general consent and approval, as does a true custom, there can be no objection, so long as such definition be recognized as designed to fit some momentary purpose of analysis, or inference, to which it is really germane. But if it be intended to reflect the meaning of law generally current among laymen, it is wholly specious. Indeed, if taken literally as the basis of action, it could scarcely fail to lead to social chaos. For example, only a fraction of the population has any idea what are the inheritance laws of a particular state, although in most cases the basic features of these laws have an ancient lineage. Yet when the time comes that the individual citizen is affected by such laws, I venture to say that it rarely occurs to him to challenge their binding force, even though he may regard them as in his case grossly inequitable and may exercise every ingenuity to secure legal relief. The same thing is true of the great mass of the statutes on our books. They are certainly law in the sense that the courts will sustain their provisions, once their constitutionality is established, although it will remain for judicial interpretation to determine just what shade of meaning shall be accorded them. But many of them rest, if at all, only in the most remote sense upon custom, or the general intelligent and conscious acceptance of them, as expedient and just. Probably only a negligible fraction of them ever come to full public knowledge. Exactly as no one individual does, or perhaps can, understand all the intricacies of modern business methods, because of their unmanageable bulk and complexity, so both statute and judge-made law have gone far beyond the range of universal individual knowledge and consent. Indeed, not even the legal mind with its high index of absorption can keep up with all these rules, many of which be it said, are contradictory of one another, especially as between different states. But to assume that under the conditions of representative government law is really law only when it rests upon such overt general consent, deriving directly from custom, and that only then is it binding, is to be grotesquely oblivious to the facts of social evolution and, if taken literally, would, I venture to repeat, lead to anarchy and the subversion of all our safeguards for civil life. Fortunately only a few persons appear seriously to entertain this view, except perhaps as it relates to special legislation to them obnoxious, especially such as has a sumptuary character. But most vocal among the number—and somewhat unfortunately as it seems to me—are lawyers whose attitude is in so far forth one tending to shatter the confidence of the man in the street in the obligation of the plain citizen to conform to honestly enacted legislation. Anything which needlessly aggravates the difficulty of maintaining vigorous allegiance to our form of government and its supporting principles is a very serious matter. Unwise laws are a misfortune which can in time be corrected; but the fomenting of organized disobedience to law in a free republic is a calamity whose ultimate effects no one can confidently predict. Consider for a moment only a few of the relevant facts:

A people numbering uwards of 120 millions, scattered over a territory of three million square miles—disregarding outlying territories and possessions—with the most diverse climatic and economic characteristics; the great centers of wealth and population found in huge industrial and commercial cities and their suburbs; a widely scattered agrarian population, of small average means and with highly diversified and often competing interests; an enormous foreign born population (about fourteen millions in numbers) often commanding our mother tongue poorly, or not at all, large parts of it wholly alien to Anglo-Saxon traditions, both political and social, and much of it gathered together in colonies in the big cities, or larger towns; over ten millions of negroes, many of them imperfectly educated and as a group predominantly settled in states where their parents, or grandparents, were slaves. These 120 million people are living in forty-eight different states, each with its own legislature pouring out laws at the rate of scores and even hundreds a year, and with the Congress at Washington equally active in producing new statutes, to say nothing of the ordinances that city governments are enacting.

It can occasion no surprise that under such conditions there should be confusion in the mind of the average citizen, which ought not to be further confounded. It is perhaps a pity that we cannot have a moratorium, a sort of legislative holiday, for a few years while we catch up with the orgy of law making in which we have been engaged. But in the meantime, when we recall the actual composition of the nation, and the fact that we are conducting the greatest experiment in free popular government the world has ever known, and that it is still on trial, we plain citizens may reasonably suggest caution in the blatant preaching by lawyers of open disobedience to law.

If one attempts, as the University naturally does, to look out dispassionately upon the situation in our contemporary American world, one gains the impression that society is regulating its commercial activities in rapidly increasing measure by devices, which if not wholly extra-legal, are at least largely so. These devices apparently owe their existence to the impossibility of managing the unparalleled complexities of the human relations of our day, with their frequent and utterly kaleidoscopic changes, by the slower processes of the courts and under rules and regulations which lack the plasticity necessary for the effective and equitable solution of many of the problems presented. And this fact, if it be a fact as I am disposed to believe, raises an antecedent, but not less interesting, question, to wit, whether the underlying conceptions upon which our Anglo-Saxon legal institutions and procedures have rested may not require to be revised and revamped in the light of our actual experience, or at all events be oriented afresh amid conceptions more pertinent to the temper of the times. I invite your attention to a few comments upon these several points and with all the humility, not to say timidity, with which any cautious layman, especially a lowly academician, must approach the arcana of the law in the presence of eminent gentlemen who extract a lux-

urious livelihood therefrom. And first as to the assumption by administrative agencies, some of them enjoying political or legal recognition, some of them not, of functions at least quasi-judicial or quasi-legislative.

The extent to which this trend has gone and its implications for our just apprehension of the place of the law and legal institutions in our national life, is, I think, much obscured by the irritating momentary congestion in many of our courts and the prevailing disposition to look for remedies to the revision of the procedures of these courts and the corresponding improvement in the machinery of the police power, as the sole, or at least the principal, means to achieve that relief which all desire from a condition rapidly becoming intolerable. I do not venture to estimate the extent to which this attitude of mind is aggravated by the back-wash of the 18th Amendment and its supporting legislation, though it must be appreciable. But whatever may be the outcome of this disposition to amend out legal procedure, there are certain other highly significant movements in process which look in a somewhat different direction.

The Interstate Commerce Commission is, so far as I recall, the first great example of the general tendency which I have in mind. Its work may be evaluated as you will—good, bad, or indifferent. But whatever its achievement, it represents a distinct step in the direction of recognizing some agency other than the established courts, and devoid of most of the formalities and limitations of procedure with which these institutions are hedged about, to deal with perplexing and insistent problems in the field of commerce, industry and finance, many of them possessing definitely legal aspects.

A younger and less well tested organization, but one representing the same drift, is the Federal Trade Commission. In the same group may be mentioned the Federal Reserve Bank system, and there are many others. The last of these efforts by the national government to supply agencies which may operate in the no-man's land between law and practical business economics is the Federal Farm Board.

The functions of these commissions and boards are sometimes thought of as merely economic, or administrative, in a narrow sense of the term. But this is far from true, for they are able by their action to affect the value of property and to control in considerable measure the forms of business relations—and that too at points of the most critical consequence, e.g. banking and credit and contract, to say nothing of long time planning in industry and agriculture.

Clearly these agencies intrude in fact, if not in theory, upon the legislative field, as well as upon the essentially judicial field, for they set up regulations, as well as pass upon the propriety and permissability of special modes of procedure. The national Congress has even created a division of the budget, which is slowly but surely attaining a control over government expenditure, which again affects in fact, if not in theory, the surveillance of the House of Representatives over finance.

If one turns to state and municipal fields of activity, one encounters a precisely similar situation carried perhaps to further extremes—at least into finer detail. Traffic commissions, zoning commissions, police commissions, city plan commissions, park boards, to say nothing of the much older school boards,—the number is almost without limit. In some enlightened cities, this one among others, the administrative management of the municipality has been confided to experts not directly elected by the people. To be sure the tenure of office of these gentlemen is hardly more secure than that of the contemporary king. Indeed, it somewhat resembles that functionary's status, in that it seems measurably dependent upon the whim of the ruling dictator or boss. Nevertheless, the city manager represents another and highly important aspect of the tendency in our times to find new and more intelligent devices for dealing with our multifarious problems, so often predominantly economic and administrative, and many of these solutions are of a character to take away from immediate legislative or legal control functions earlier confided exclusively to courts or legislatures or city councils.

More interesting perhaps than even these quasi-governmental arrangements are the many, and rapidly increasing instances of voluntary co-operative agreements among individuals and groups set up to deal by extra-legal methods with their own problems, otherwise certain to develop into subjects of legal controversy. These agreements are to be sure conceived partly in the interests of preventing disastrous economic competition, but also with a view to prompt and equitable adjustments of divergent interests and desires, which sooner or later would issue in costly and possibly futile litigation. Some of these procedures are perhaps a bit under shadow of suspicion as being designed to exploit the general public for the benefit of the smaller group, and no doubt there are instances of such objections. Certain trade unions and employers' associations will be thought of in this connection. However, I am citing them neither for approval nor condemnation, but simply as examples of a most significant trend. On the other hand, it is hardly necessary to recite the arbitration agreements widely entered into as between employer and employee, the insurance devices by means of which the courts are freed of a vast amount of damage suits, co-operative marketing associations, and many others, all of them resulting in simpler and more plastic methods of securing equitable and workable solutions of new and crucial problems, many of them precipitated by the revolution in industrial methods and the extraordinary advances in transportation facilities of all kinds, and not a few of them made possible by new methods of credit financing.

The cynically minded will also doubtless cite as examples of a similar tendency in still another field, the so-called *rackets*, whereby gentlemen of tropical imagination and a predilection for short but merry lives, undertake to impose by ruthless force on their unhappy victims monopolies of a character so lucrative as to make Robin Hood, Captain Cook and the eminent pirates of the Spanish main look like very minor prophets, not to say pikers. However, there is this not unimportant difference that our racketeers are outlaws pure and simple, while the individuals to whom I have been referring are, for the most part, serving a use-

ful purpose, which our inherited social and legal machinery is quite incapable of meeting.

Even the lawyer himself now finds a commanding field of usefulness quite as much in advising his clients how legally and judicially to organize large business enterprise, how to avoid wasteful litigation, how to make reasonable adjustments with rivals, as in carrying to a successful conclusion actual cases brought into court. In other words, a large part of the job of a great contemporary lawyer is found in devising means to keep out of court. To be sure certain parts of these activities are assailed as being nothing more than the vicious purveying to unscrupulous clients of clever advice how to beat the law, and probably this indictment could be at times sustained. But in the large these services rendered by many of our leading lawyers are doubtless in the public interest and they must certainly be counted a great benefit in the measure in which they lessen useless litigation and secure property rights against the menace of predatory assault.

One may observe a similar trend within the jurisdiction of the courts themselves. The best prosecuting attorney is generally held to be the one who secures in advance of trial substantial agreements from defendants as to what course shall be followed. The procedure of the court is thereupon often little more than a quick endorsement of such an agreement. This practice may, or may not, be always in the interests of abstract justice, but it certainly reflects the temper of our time in its desire for prompt and practical settlement of difficulties, and where wisely and successfully employed, it reduces enormously the burden on the court and the expense to the community entailed by long drawn out trials. To be sure there are abundant instances where the interest of one or both litigants in a claim is to defer indefinitely the time of final settlement, but this fact is quite beside the point under discussion.

I speak with a limited knowledge of which I am but too well aware, yet my impression, based on a number of considerations, is that a very large part of the important current litigation has to do with matters in which a judicious, if not indeed a judicial, decision rests often upon intimate familiarity with economic, scientific, engineering and social phenomena, quite as much as upon a thorough knowledge of the law. I take this to be true of criminal cases hardly less than of civil cases, and even constitutional issues on intimate analysis disclose a similar situation. Now if this be true in any considerable degree, it would seem to follow that a training for the career of the law should carry with it the effort at some stage to introduce the embryonic lawyer to these basic fields of human activity. It is my conviction that the universities can be peculiarly useful at just this point, not only by training men with this broader outlook, but also by promoting in the community a fuller appreciation of its significance. It would doubtless be absurd to insist that every young lawyer should be exhaustively trained in psychology and psychiatry, even though bitter experience in the courts, and especially in the juvenile courts, reveals the frequent need for some knowledge of these phases of the science of behavior. This need many courts are trying to meet by the employment of experts attached to the court, and in numerous instances with marked success. Nor would it be reasonable to demand of the legal tyro a thorough knowledge of banking or international exchange, or accountancy, or wholesale and retail marketing, simply because much litigation is concerned with such matters and the lawyer is certain sooner or later to encounter them. Nor is it perhaps essential that the newly hatched lawyer should have an exhaustive knowledge of the history and principles of taxation, although he will not have practiced long before questions involving these principles and the derived practices will cross his professional path. Nor again, is it conclusively indispensable that he know in all detail just how society deals with the problems of public education, with charities and especially with the problems of hospitalization and public health. But I am quite sincere in saying that I think the fullest and most direct possible contact with such fields of knowledge and experience—and many others closely related which I have not mentioned—may render the young barrister immensely more useful, than if his entire training be given over to the mastery of legal principles and precedents and rules and the niceties of legal analysis and inference. And I believe this to be especially true, if, as so often happens, the lawyer comes at any time into a legislative position where he may exercise a decisive influence in framing statutes and ordinances. And still more should I regard it important, if he should assume the responsibilities of a judicial post. It is not merely, nor indeed primarily, the direct practical use he might make of knowledge previously gained in the fields I have mentioned; it is rather the entire attitude of mind in the approach to his problems that is likely to be beneficially affected. A purely traditional legalistic view-point on the part of our courts toward many of the more acute issues which today vex our political and industrial-economic life may do untold damage, stimulating to resentful excesses of radical opinion and action, and rendering far more difficult that wise adjustment of law to experience without which orderly social progress is impossible. It is not that skill in the use of legal logic is a bad thing, but that in our generation at least the premises with which, and upon which, that logic works are so crucially important, and these premises run out into the very fabric of our social and economic life.

Reviewing the major considerations which I have traversed, it seems to me fairly obvious that we are in a condition of flux in the reconstruction of the social and economic order, which is profoundly affecting the courts and our national attitude toward legal procedure of every kind. Somewhere in the body politic there should be found agencies which are competent to bring persistently to bear on these problems the resources of disinterested and highly trained intelligence, that society may at least have at its disposal, if it sees fit to use it, accurate and exhaustive knowledge of its own constitution and history and the probable consequences of one or another of the tendencies which are operative in contemporary affairs. No other agencies are so well equipped to serve this function as the universities. They have already begun to serve it, partly of their own initiative and partly in

response to requests from the bench and the bar. I believe this rapprochement between the universities and the legal profession is pregnant with the most significant and fruitful consequences and not less for the universities themselves than for the community. I earnestly bespeak your sympathetic support of the movement whenever opportunity offers.

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Zoning: Analysis of Purposes and Legal Sanctions

(*Continued from Page* 167)

fornia Civil Code which reads, "Neither specific nor preventive relief can be granted to enforce a penal law, except in case of a nuisance, nor to enforce a penalty or forfeiture," but the court places its decision on broader grounds. Logically it was compelled to this conclusion by the grounds upon which it had chosen to base its decisions sustaining the zoning power. If the justification of zoning lies in "preserving the civic and social values of the American home," of course, an injunction on behalf of the owner of neighboring property is scarcely an appropriate remedy. In Wisconsin, where the courts have more critically analyzed this class of legislation, the right to employ injunction relief to prevent violation of a zoning ordinance has been recognized in a number of well reasoned cases.[24, 25] The appropriateness of the remedy was also recognized in *City of New Orleans* v. *Liberty Shop*.[26]

"Legislation cannot be judged by theoretical standards. It must be tested by the concrete conditions which induced it."

(Note: Since the above was written an interesting decision has been handed down by the Supreme Court of Illinois, in the case of *Michigan Lake Bldg. Corporation* v. *Hamilton*, 172 N. E. 710, June 20, 1930. In this case the court held invalid an amendment to the Chicago Zoning ordinance which changed the building height limitations in certain portions of a district in which the property had previously been subject to a lower height limitation. In the decision the court uses the following significant language:

"In the instant case there appears to have been no consideration given or allowance made for existing conditions, for the conservation of property values, or for the direction of building development to the best advantage of the entire city."

And it quotes with approval the language of the lower court as follows:

"'The values of buildings put up within the last six years may not legally be unreasonably impaired by a sudden sweeping change made by the city council under the guise of zoning. That would not be "the conservation of property values, but ex post facto confiscation of property rights without compensation."'")

24. Holzbauer v. Ritter, 184 Wisc. 25; 198 N. W. 852.
25. Bouchard v. Zetley, 196 Wisc. 635; 220 N. W. 209.
26. 157 La. 26; 101 So. 798.

Arizona

Arizona Bar's Annual Meeting

Meeting of the Arizona Bar Association was held in the City of Globe, Gila County, on the 10th day of January, 1931.

The principal business before the meeting was a proposed act for the Incorporation of the Arizona Bar, the Act to be introduced in the Legislature convening on the first Monday in February.

Considerable discussion of the proposed Act resulted in its endorsement by the meeting and a committee was appointed by the President to introduce and steer the same through the Legislature.

Mr. Will Shafroth of the Colorado Bar addressed the meeting on the subject of educational requirements for admission to the bar which resulted in considerable discussion of this matter and in the endorsement by the Association of the requirements as recommended by the American Bar Association.

Mr. Barnett E. Marks gave the meeting a resume of the last meeting of the American Bar Association, after which the election of officers for the ensuing year was held resulting in the election of Francis M. Hartman, Tucson, Pima County, President and James E. Nelson, Phoenix, Maricopa County, Secretary, and an Executive Committee consisting of Arnold T. Smith, Judge Fred W. Fickett and Judge W. R. Chambers all of Pima County.

Following the business meeting a banquet was held at the Old Dominion Hotel, which meeting was again addressed by Mr. Shafroth and also by Dr. Shantz, President of the University of Arizona.

—James E. Nelson, Secretary.

Maine

Maine Bar's Annual Meeting—Committees to Take Up Compiling State Annotations to Restatements

The regular meeting of the Maine State Bar Association was held in Augusta, on Wednesday, January 21, 1931. The forenoon session held in the Judiciary Room at the State House was given over to business matters entirely. Reports of the Treasurer and Secretary were read and accepted. The Secretary's report showed the Association in a healthy condition with an active membership of three hundred and sixty. Twenty members have died during the years 1929 and 1930, including Judge Charles F. Johnson, formerly Justice of the United States Circuit Court of Appeals, and Retired Justice Albert M. Spear of the Maine Supreme Court.

Necessary committees were appointed to report at the afternoon session.

The afternoon session was held in the Senate Chamber at the State House. The feature of this session was an address upon the work of the American Law Institute by the Director of the Institute, William Draper Lewis of Philadelphia. Following the address, the committee on resolutions for deceased members reported as did also the committees on membership and nominations. Forty-two new members were admitted. Officers elected for the ensuing two years included President Leonard A. Pierce of Portland, Vice Presidents, Edward F. Merrill of Skowhegan, Dana S. Williams of Lewiston, and Carroll N. Perkins of Waterville, Secretary and Treasurer, Ralph W. Leighton of Augusta, Executive Committee, the President ex-officio, Harold H. Murchie of Calais, Louis C. Stears of Bangor, Walter L. Gray of South Paris and Charles E. Gurney of Portland.

Through proper committees the Association voted to take up the matter of compiling Maine annotations for the statement of law as promulgated by the American Law Institute and also to secure needed legislation along certain lines.

The culminating feature of the meeting was the banquet in the evening at the Augusta House. Over one hundred were seated at the tables. The retiring President of the Association, Ralph T. Parker of Rumford, presided over the post prandial exercises and the speakers were Hon. William Tudor Gardiner, Governor of Maine; Hon. William Draper Lewis, Director of the American Law Institute; Chief Justice William R. Pattangall of the Supreme Judicial Court of Maine and Justice Harry Mansur of the Superior Court.

Ralph W. Leighton, Secretary

Nebraska

Nebraska Bar to Push Legislative Program—Provides for Special Committee on Unauthorized Practice

The Nebraska State Bar Association, at its 31st annual meeting, held at Hotel Fontenelle, Omaha, on December 29 and 30, 1930, had, as its guests and principal speakers, Dean James Grafton Rogers, of the University of Colorado School of Law, and former Senator James A. Reed of Missouri. Dean Rogers addressed the Association on December 29th on "The Lawyers' Shifting Scene," dealing with the lawyer's place in society, his life, character, training and the changes occurring in his daily life and work. Senator Reed spoke on December 30th, on "The Growing Evil of Paternalism," crisply challenging the rapid diffusion and serene acceptance of soporific regulation.

The address of the president, J. L. Cleary, of Grand Island, was entitled "Why a Bar Association?". A discussion of "The Rulemaking Power of the Supreme Court in Nebraska" was introduced by Charles B. Letton. A motion was adopted requesting the Supreme Court to appoint a committee of three district judges and five practicing attorneys to assist it in the formulation of rules and in endeavoring to obtain such effectuating legislation as might be necessary in view of the limitation in the Constitution of Nebraska permitting the Supreme Court to formulate only such rules as are "not in conflict with laws governing such matters".

The Association renewed its endorsement of the educational standards recommended by the American Bar Association and directed that a bill be introduced in the current session of the legislature prescribing such requirements. A similar bill has been sponsored by the Association in two previous legislative sessions, but without success.

Adoption of the Uniform Business Corporation Act by the legislature was also urged by the Association. This act was introduced in the 1929 session of the legislature, but failed of passage.

The Committee on Legislation was instructed to endeavor to obtain the enactment of legislation preventing trust companies from engaging in the practice of law in any form whatever, and a special committee was created to consider the subject of lay encroachment, to be known as the Committee on the Unauthorized Practice of Law.

A recommendation that the Association sponsor a constitutional amendment providing for the election of judges of the supreme court from the state-at-large instead of from districts was rejected.

The Committee on Legislation called attention to the weakness of the Association to effectuate its legislative program in the past, and provision was made for a special committee, consisting of the chairmen of the several standing committees, to coordinate the program of the Association and to cooperate in securing its adoption.

A comprehensive report of the work of the American Law Institute was made by N. H. Loomis, chairman of the Committee on Cooperation with American Law Institute, and, on recommendation of the committee, the Executive Council was directed to give consideration to the matter of compensation for the lawyers who have been engaged in compiling the annotations of Nebraska cases for the Institute's restatement of the law of agency.

On recommendation of the Committee on Judiciary, the Association endorsed an amendment to the statute, leaving it to the discretion of the trial court whether persons jointly indicted or informed against for a felony should be given separate trials.

The meeting concluded with the annual dinner on the evening of January 30th. J. L. Cleary, retiring president, was toastmaster and Roland V. Rodman, of Kimball, Rev. F. W. Clayton of Omaha, Yale Holland of Omaha, Senator James A. Reed, and Judge Joseph W. Woodrough, of the United States District Court, made responses.

The meeting was one of the largest that the Association ever has held. Ninety-nine new members were admitted, making the total membership approximately 1200 in number.

The officers elected for 1931 are as follows: Frederick W. Shepherd, Lincoln, President; W. H. Pitzer, Nebraska City, Frank J. Munday, Red Cloud, and Lawrence I. Shaw, Omaha, Vice

Presidents; Harvey Johnsen, Omaha, Secretary; Virgil J. Haggart, Omaha, Treasurer.

HARVEY JOHNSEN, Secretary

New York

President Hiscock Given Signal Honor By State Bar Association—Addresses at Annual Meeting

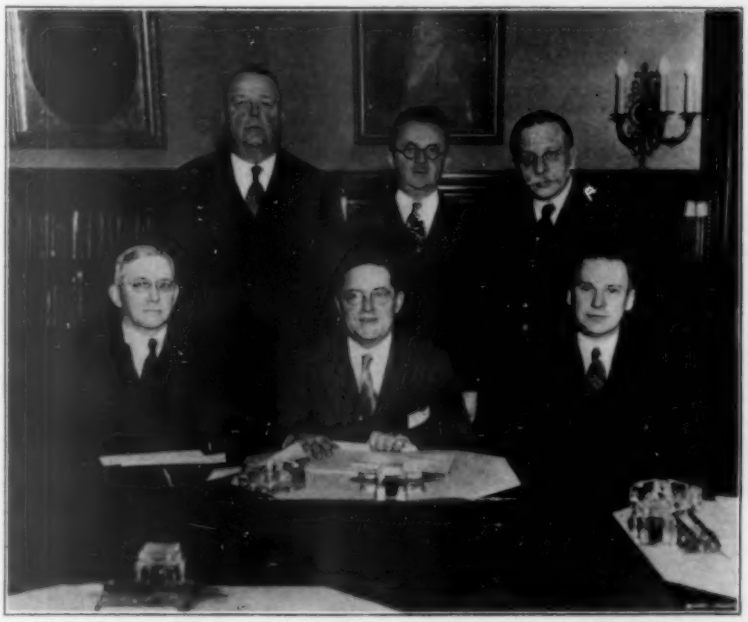
For the first time in the history of the New York State Bar Association a president has been elected for a third term. This honor falls to Hon. Frank H. Hiscock, former chief judge of the New York State Court of Appeals, who was unanimously reelected at the 54th annual meeting of the Association January 16 and 17 in the building of the Association of the Bar of the City of New York.

Other officers reelected include Former State Senator Charles W. Walton, secretary; Harry M. Ingram, treasurer; Samuel Seabury, James C. VanSiclen, Joseph Rosch, Fred Linus Carroll, George Bond and Eugene Voorhis, vice presidents. Three new vice presidents were elected. They are Leon C. Rhodes, Robert H. Jackson and George H. Taylor, Jr.

The Judicial Section of the State Bar Association, composed of judges of the various courts, chose as its chairman Supreme Court Justice Robert F. Thompson to succeed Supreme Court Justice George V. Mullen. John C. Crapser and F. Walter Bliss, both Supreme Court Justices, were elected secretary and treasurer, respectively.

Silas H. Strawn, former president of the American Bar Association, delivered the annual address. His subject was "Should Our Anti-Trust Laws Be Amended." The chief topic for discussion at the meeting was "Admissions to the Bar." The main address was made by William D. Guthrie, former president of the Association, and those who took part in the discussion included John Kirkland Clark, Abel E. Blackmar, James V. Coffey, Ellsworth C. Laurence, Rollin W. Meeker, Nicholas J. Weldgen, Richard H. Templeton and Alfred M. Bailey.

HON. FRANK H. HISCOCK
President, N. Y. State Bar Association



Associated Press Photo

Prominent Lawyers at Annual Meeting N. Y. State Bar Association Jan. 16. Left to Right, Seated: Sen. John Knight, Arcade, Majority Leader in Senate; Supreme Court Justice Erskine C. Rogers, Hudson Falls; Professor Richard R. Powell, Columbia University. Standing: Supreme Court Justice John C. Crapser, Messena; Philip J. Wickser, Buffalo; Julius Henry Cohen, New York City.

The following papers were read: "The So Called Rule Against Perpetuities in New York," Professor Richard R. Powell of Columbia University; "Proposed Legislation on the Valuation of Public Utilities," Senator John Knight; "Trial by Jury," Emory R. Buckner.

Speakers at the annual dinner and at the Judicial Section conference included Frederick E. Crane, associate judge of the New York State Court of Appeals; Charles B. Sears, presiding justice of the fourth department; Robert Von Moschzisker, retiring chief judge of the Supreme Court of Pennsylvania; Martin W. Littleton; Lieutenant Governor Herbert H. Lehman of New York; Dr. Livingston Farrand of Cornell University, and Myron C. Taylor.

CHARLES W. WALTON, Secretary

Ohio

Ohio State Bar Association Urges Ratification of World Court Protocol—Considers Many Legislative Matters

The mid-winter meeting of the Ohio State Bar Association was held at Columbus Jan. 29, 30 and 31. It was called to order by President Phil J. Bradford. Mayor James J. Thomas and President Karl E. Burr of the Columbus Bar Association delivered addresses of welcome, to which Judge Walter A. Ryan of Cincinnati responded.

The meeting was devoted largely to a consideration of the reports of committees. The Membership Committee presented 401 applications and these were all elected. The Committee on Revision of the Probate Code reported that it had prepared a bill, pursuant to action of the Association, and had presented it to the Legislature, where it was receiving careful and courteous consideration.

Thursday afternoon President Bradford delivered his address in which he dealt with the work of the Association, reviewed the encroachments on the practice of law by outside agencies, and directed attention to the bill providing for the all-inclusive bar approved by the

Association and introduced in the Legislature. The Committee on Industrial Commission reported that certain bills relating to claims had been placed in the hands of a representative for introduction in the Legislature. It also recommended three other measures amendatory of statutes in its field, and these were approved. The Committee on Jury Law Reform reported that the proposed codification of jury laws had been drafted and was ready for introduction in the Legislature. This was followed by an address by Hon. Smith W. Bennett of Columbus, past president of the Ohio Bar Association, who spoke on "The Cycle of the Trust."

Hon. Carrington T. Marshall, Chief Justice of the Supreme Court of Ohio, addressed the Association upon the subject, "Some Aspects of Study of Judicial Administration."

At a meeting of the Conference of Bar Association Delegates, held Thursday evening, Hon. Thomas W. Shelton, of Norfolk, Virginia, spoke on the subject, "The Rule Making Power of the Courts."

The Committee on Judicial Administration and Legal Reform presented a report Friday morning embodying a large number of recommendations, which were acted on separately. Chairman John A. Elden, of the All-Inclusive Bar Committee, reported that, pursuant to the instructions of the Association, the committee had prepared a bill and had had it introduced in the Legislature. He explained its provisions and asked the members to give it support. Mr. Ray Martin of Toledo moved that the report of the committee be disapproved, but the motion was ruled out of order. This was followed by an address by Hon. John M. Vorys of Columbus on "The Law of the Air" and another by U. S. Senator Robert J. Bulkley of Cleveland on "Some Impressions of the Senate in Action." He discussed the Wickersham Committee's report at length and predicted that neither the President nor the Republican leaders would take steps to carry its recommendations into execution.

Friday afternoon the Committee on Uniform State Laws recommended that the Association approve the Uniform Declaratory Judgments Act, the Uniform Firearms Act and the Uniform Conditional Sales Act—which recommendations were adopted. The committee on Criminal and Penal Laws presented thirty proposed amendments to the Penal Statutes, and a resumé of a proposed bill to provide for the sentencing, paroling and good time of prisoners in Ohio. The measure was approved.

Hon. Royal A. Stone, of the Minnesota Supreme Court, addressed a meeting of the Judicial Section on "The Plight of Our Profession." At the regular session of the Association Hon. Fred W. Warner of Marion, Chairman of the Legislative Committee, reviewed its work and asked that all differences as to Bar Association measures be ironed out before they reached the Legislature, so as to insure united support of the bills after they were introduced. At this session the Association approved House Bill No. 118, providing for licenses for all air craft and pilots in Ohio, for regulation of air ports, for an advisory aeronautical commission and for air marking, at the request of the Committee on Aviation.

The banquet was held Friday afternoon, Hon. Hugh Huntington of Columbus presiding as toastmaster and presenting the distinguished guests. The addresses of the evening were made by Governor White, Mr. Guthrie and Judge Parker. The latter's subject was "American Democracy and Constitutional Government."

At the last session, on Saturday morning, a resolution approving and urging a ratification of the protocols which assure the adherence of the United States to the Court of International Justice was adopted.

Utah

DEAN F. BRAYTON
President, Utah Bar Association

Utah Bar to Press Bill for Inclusive Organization

The annual meeting of the Utah State Bar Association was held at the Hotel Utah, Salt Lake City, on December 13th, 1930.

The address of the President, Wade M. Johnson, on the subject of "Lay Encroachments" contained a discussion of certain practices in which attorneys should be interested. The President's address also pointed out a number of pitfalls which existed in connection with these practices.

An address was also made by Charles R. Hollingsworth of Ogden, Utah, on the subject of "Uniform State Laws." Mr. Hollingsworth's address was of great interest and included a report on the various uniform acts that had been approved by the Commission on Uniform Laws as well as those which had been adopted in this state.

An address was also made by George H. Smith, Esq., chairman of the Committee of the American Bar Association, on "Legal Education and Admission to the Bar" in which Mr. Smith reported to the members present the history of the development of his committee and its growth as an important adjunct of the American Bar Association.

All of the addresses were listened to with great interest by those present.

Reports were also made by the retiring Secretary and Treasurer which were ordered approved and filed. The report of the Grievance Committee by Daniel H. Thomas, as chairman, was also read and ordered filed.

The matter of organizing the State Bar along the lines of a bill introduced in the 1927 and 1929 Legislatures came in for some discussion and the Bar Association went on record again as favoring the enactment of such a law and directing its Executive Committee to endeavor to secure its passage.

The following officers for the ensuing year were then elected: President, Dean F. Brayton; Salt Lake City; First Vice President, Leroy B. Young, Ogden; Second Vice President, Leon Fonnesbeck, Logan; Secretary, Allan S. Tingey, Salt Lake City; Treasurer, Harley W. Gustin, Salt Lake City.

At the banquet in the evening of the same day at the Hotel Utah at which many ladies were in attendance, the retiring President, Wade M. Johnson, Esq., of Ogden, Utah, acted as toastmaster and the Association was honored by the presence of four of the members of the Utah Supreme Court. Honorable J. H. Peterson, of Pocatello, Idaho, a former Attorney General of Idaho, gave the address on the subject, "The Statutory Organization of the Bar in the State of Idaho." General Peterson's remarks indicated that in Idaho the statutory organization of the Bar had been very successful and he urged that such organization be made a part of the law of the State of Utah.

ALLAN S. TINGEY, Secretary

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We are a Unit of The Manhattan Company which has Capital Funds of $152,374,245.23

SECURE AS THE BEDROCK OF NEW YORK